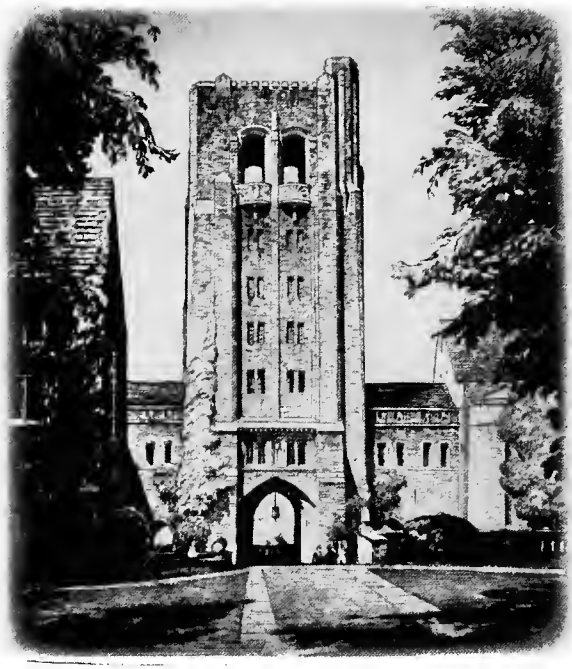

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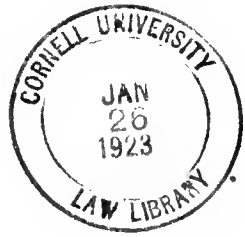

THE ORIGIN AND GROWTH

OF THE

COMMON LAW IN ENGLAND AND AMERICA

A study of Private Law, comparing the evolution of the Common Law and the Civil Law,

by

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DEDICATED

TO

JUAN B. HUYKE

FRIEND, EDUCATOR, AMERICAN

PREFACE

This volume is made up of the substance of lectures delivered before the law classes of the University of Porto Rico in the course on English and American Law. The reception was so kind by the students, and by the local public upon publication in the weekly "Progress", that I venture to submit them in book form to a wider circle of readers. While they are law lectures, the discussion was before an audience brought up in a Civil Law atmosphere and this made it necessary to be as untechnical as possible; it is hoped therefore that the book will prove of value to laymen as well as to lawyers.

By the Common Law I understand the whole Anglo-American system of private law, however originating, with the exeption of Admiralty. During years on the bench and now as professor and as practitioner the differences of the Common Law and the Civil Law have struck me forcibly, and it is a curious fact that the contrast has never been fully discussed. Possibly the reason is that those familiar with the one system are seldom familiar with the other. My duties as Federal judge applying the local system have made it necessary for me to try and investigate the differences and look for their cause. The result will be found in these lectures.

The work of Sir Henry Maine has to be supplemented by subsequent investigators, but his illuminating maxim that legal progress has been through Procedure from Status to Contract will never be superseded. I have found in the principle underlying it the explanation which I was seeking. In the Introduction is a discussion of what constitutes Status, and the book as a whole is a development of the theme that law begins with Status and that the difference between the two leading systems is that while the Common Law has been a continuous growth of Contract, the Civil Law has been a gradual refinement of Status.

In the study of the different epochs use has been made

of the division of Private Law into the five heads of Persons, Family, Succession, Property and Obligations which I learned at Leipzig from that great teacher, Windscheid. Although not original with him, he probably popularized it when he made it the basis of his well known **Pandektenrecht**. That all of these except Obligations relate to Status is perhaps more emphasized in these lectures than elsewhere. Obligations, it may be observed, are considered under their two divisions of Contracts and Torts as more familiar to Common Lawyers. The two lectures on Trespass and Assumpsit should probably have a sub-head of the Jury system, for that developed and is treated in this connection.

For completeness there should be a fuller treatment of the **Leges Barbarorum** and of the Canon Law, but at least they receive careful attention as far as space permits. Opportunity may offer in future for a more detailed exposition of these two great factors in the development of all Western law.

No one knows better than myself that this book is at best only an introduction, but a good introduction to law has a real place to fill. The authorities before each lecture are themselves only a selection, a selection which individual tastes would perhaps vary, but at least they will enable students to go further into the subjects discussed. Space compelled the limitation of cases to those in the Supreme Court. The Tables are useful, but necessarily brief and probably omit some men and events which others would think appropriate; they can be enlarged at will.

Special thanks are due to Mr. Harwood Hull for venturing to publish these lectures in the "Progress" and for kindness during the whole work. Typographical errors occur; these are to be regretted, but are unavoidable in printing in Porto Rico, where English is as yet an acquired language. The printer has done his best under the circumstances and I do not think any error occurs which does not, so to speak, correct itself. I want to thank also Rachel

B. Hamilton, my wife, not only for the inspiration and sympathy which makes every work a pleasure, but suggestions made and used in every lecture. I should also thank the Harvard Law Review for permission to use articles which I have published in that review. The one on Civil and Common Law is reprinted almost verbatim.

Peter J. Hamilton.

San Juan, P. R.,

Nov. 15, 1922.

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1603 James I.
1625 Charles I.
1649 Commonwealth.
1660 Restoration Charles II
1685 James II.
1689 William and Mary.
1702 Anne.
1714 George I.
1727 George II.
1760 George III.
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1820 George IV.
1830 William IV
1837 Victoria.
1900 Edward VII.
1911 George V.

III.—CHIEF JUSTICES OF THE UNITED STATES

N. B.—The dates are those of appointment; since Marshall the Chief Justices have died in office. The Chief Justices are printed in capitals; the dates of appointment of some of eminent Associate Justices are also given. Chief Justice White had served in the Confederate army.

A. D.

1790 JOHN JAY, of New York.
1795 JOHN RUTLEDGE, of South Carolina. (Not confirmed).
1796 OLIVER ELLSWORTH, of Connecticut.
1801 JOHN MARSHALL, of Virginia.
1811 Joseph Story, of Massachusetts, associate. Died 1845.
1835 ROGER BROOKE TANEY, of Maryland.
1862 Samuel F. Miller, of Iowa, associate. Died 1890.
1863 Stephen J. Field, of California, associate. Resigned 1897.
1864 SALMON PORTLAND CHASE, of Ohio.
1870 Joseph P. Bradley, of New Jersey, associate. Died 1892.
1874 MORRISON REMICK WAITE, of Ohio.
1888 MELVILLE W. FULLER, of Illinois.
1910 EDWARD DOUGLAS WHITE, of Louisiana. (Previously an associate.)
1922 WILLIAM HOWARD TAFT, of Ohio.

IV.—GREAT LAW WRITERS AND TEACHERS

Glanville, Ranulf, died 1190.
Bracton, Henry, died 1267.
Bartolus, 1314-1357.
Cujas, Jacques, 1520-1590.
Gothofredus, D. C. 1549-1622.
Domat, J., 1625-1696.
Lamoignon, G., 1627-1677.
D'Aguesseau, H. F., 1668-1751.
Montesquien, C. L., 1689-1755.
Pothier, R. J., 1699-1772.
Blackstone, Wm., 1723-1780.
Portalis, J. E. M., 1745-1807.
Kent, James, 1763-1847.
Savigny, F. C., 1779-1861.
Story, Joseph, 1779-1845.
Puchta, G. F., 1798-1846.
Huschke, P. E., 1801-1886.
Fustel de Coulanges, 1830-1889.
Minor, John B., died 1895.
Bruns, C. G., 1816-1880.
Ihering, Rudolph, 1818-1892.
Windscheid, B., 1817-1892.
Mommsen, Theodor, 1817-1905.
Dwight, T. W., 1822-1892.
Maine, H. S., 1822-1888.
Tucker, Henry Randolph, 1823-1897.
Pomeroy, John Norton, 1828-1885.
Langdell, C. C., 1826-1906.
Brunner, H., 1840-
Sohm, Rudolph, 1841-
Bigelow, M., M., 1846-
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Pollock, Frederick, 1845-
Girard, P. F., 1852-
Altamira, Rafael, 1866-

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INTRODUCTION

Such is the unity of all history that any one who endeavors to tell a piece of it must feel that his first sentence tears a seamless web.—Maitland.

Authorities.—Edward Jenks, Law and Politics in the Middle Ages. Short History of English Law. W. S. Holdsworth, A History of English Law. Pollock and Maitland, History of English Law. O. W. Holmes, Jr., The Common Law. Select Essays in Anglo-American Legal History. Roscoe Pound, Readings on the History and System of the Common Law. Essays in Legal History, P. Vinogradoff, editor. F. W. Maitland, Collected Papers. Harvard Law Review, passim. P. Vinogradoff, Outlines of Historical Jurisprudence.

The study of legal institutions is one which should attract all thinkers. Pope tells us that the proper study of mankind is man, and law is in general that system of rules which holds society together. These rules so far as they come under the head of law fall into three or four classes. One of the most interesting divisions relates to government, and is called political or constitutional law. This, however, does not concern us in our present course of study. Another class relates to offenses against the public and is known as criminal law, together with the procedure to enforce it. This shows that idea of right and wrong entertained at different times; but this too is outside of our scope. There remains the subject of private law, those rules which govern the relation of man and man, covering persons and property in all phases, and largely the product of evolution from the most primitive forms. There can be nothing of greater interest than this, and the world has seen two great systems of such law. The one is called the Roman or Civil Law, and the other the English or Common Law. They may be contrasted, but they also have strong resemblances. One governs the south of Europe, the other the north of Europe, and each prevails in colonies in different parts of the world.

Each of these has a traceable history of about fifteen hundred years, the longest, so far as we know, in history. There were others, for instance the Babylonian, but this has breaks which cannot yet be remedied. Both the Civil and the Common Law begin with history itself, that is to say, with mankind in primitive conditions, and indeed both are products of the Aryan stocks, and afford most interesting comparisons. Sir Henry Maine said that Civil Law begins with a code and ends with a code, the XII Tables and the work of Justinian; on the other hand, the Common Law has never had a code in the proper sense of the word, although there have been numerous digests. Indeed the Civil Law, as Maine shows himself, begins far back of the XII

Tables.

If it is difficult to define accurately the differences between the two systems, it is even harder to answer the question Why? How did these differences arise? The answer opens the door revealing the beginnings of mankind. And yet if we look around we find ourselves still bound about with ties of status. Status has been differently defined. Herbert Spencer says it is regimentation. Aristotle carries us a step further when he distinguishes between the static and dynamic,—power at rest and in motion. Perhaps we get closest to it when we think of natural and artificial. We are born or enter necessarily into natural relations which we cannot change, and generally do not want to change, of son, brother, husband and the like. Those connected with religion are as influential, with all our claim that the church has a human element. Even as citizens the same rule holds; and all because the Family, the Church and the State, in one form or other, are fundamental, and cannot be escaped if we fly to the uttermost parts of the earth. Probably it all began with the **gens**, that natural organization of kindred which was the first association and the first protection which mankind knew. This was formal to the core, for only so was there escape from the brute force of the stongest. Thus formality became ingrained in humanity.

The growth of the individual at the expense of the kindred group is the story of civilization; as Sir Henry Maine says, progress has been from Status, or Nature, to Contract or Individuality. "Contract" is perhaps not happy, as the advance includes all forms of contact, tort as well as contract; but the expression is striking and will last. There was the same progress on the Euphrates, there was the same contrast between the civilizations of Greece and Egypt; but we have come to know more of Rome, and the law of Rome was crystalized into codes at the time when contract had been defined and differentiated as never before, although in strict forms, while the family had not only practically superseded the **gens** but was itself changing. Justinian prevented further change by codification

which bore the imprint of the Greek love of beauty, just as the Church of that day was adopting a service and creed showing the same origin.

Restricting ourselves to the Common Law, we can almost omit the primitive period from our consideration. The Roman Law in Britain was practically blotted out by the coming of the Anglo-Saxons, although we shall find certain land customs surviving from before Roman times. We have to presuppose primitive customs on the mainland, what we now call Schleswig, but we trace the transition from these to law proper only in England. It is not without interest to note in passing that the English Common Law and the Spanish Civil Law have some Germanic traits in common, for the Saxons who created the Common Law came from the River Elbe, and the Visigoths who furnished much to Spain came from the equally Teutonic river Oder, further east. The Visigoth, however, reached the peninsula after long residence in Roman provinces near Constantinople, and so yielded to Civil Law influences much more than did the Saxons of the north. The interesting point for us here in Porto Rico, where the systems meet face to face, is to trace the likenesses and differences growing out of this geographical distribution of races.

We shall find that the history of the Common Law is the development of individualism, the growth of local communities and their customs, with accent always on individuality. The Roman Law on the other hand laid the accent upon the government, and law in historical times is the rule of conduct imposed by a superior. The contrast is shown in all English and Spanish institutions down to the present day. The growth of individualism in England had many stages, the more important of which we shall trace during the present term, and in conclusion it may be we shall find that the two systems not only have much in common but are approximating a common goal in what has been provisionally called the socialization of law. This is so modern a development, and its tendencies are as yet so uncertain, that we shall lay it aside for most of our course and take it up only at the end. Our main study will be the

development of individualism or the Common Law,—for they are almost synonymous.

Anglo-Saxon law, therefore begins with the customary law brought from the continent. The beginning of social rules is in the primitive father, mother and child, although the form which this association first assumes is and probably always will remain a subject of debate. Society did not begin with monogamy, but if it did begin with the miscellaneous unions common among other animals than humankind, it developed into different forms of sex relation. These different forms are interesting studies, but beyond the scope of this course of lectures. We must begin with the planting of individuals or families which crossed the North Sea in little coracles, landing in England and driving the Britons before them, where they did not settle among them. Kinship was the central fact for these Germanic invaders, showing itself in groups of kindred. Whether they came from the continent or were developed over again in the new country, may never be known; but it is certain the invaders were grouped as units of kindred and as on the continent protected each other. If a member of the group was injured, the injury according to notions of that time was not to the individual but to the group. This group had originally carried on the blood feud, of which the Corsican vendetta and Tennessee mountain feuds are modern reflections. By the time of the English invasion, and indeed a perequisite to common action in the invasion, the blood feud had given way to compromise, by which life or injury was valued and paid for by the injuring to the injured group. How these different groups managed to agree upon the elaborate system of **wergeld** or valuation we do not know, but we shall find that the Anglo-Saxon system was based thereon. The beginning of law was the collection of these **wergelds**.

Perhaps one could more truly say the beginning of custom, for it was in England that there began the distinction between custom and law. The wergeld system grew up out of the daily experience of these groups, whether family or tribe, while what we call law, **lex**—something placed

—originated when writing of some kind came into use. Custom was the result of natural evolution; law might be merely the expression of custom in writing, but this could not be until social organization had progressed far enough for there to be a government, what we now call a state. This generally took the form of kingship, out of which all other forms were ultimately to evolve. In the very writing down of customs, however, whether this was in England, on the Euphrates or on the Tiber, the authority which digested was for that very reason strong enough to make some changes in the law, whether by real legislation or by making the different parts conform better to each other. It is this change to statute,—also something fixed or placed, —which marks the beginning of law in our sense of the word; and this occurred in Anglo-Saxon times. But the details of this belong rather to a consideration of Anglo-Saxon law itself.

We shall find that Anglo-Saxon institutions were built upon such local customs and that there came a great break in their development with the Norman Conquest. It is quite true that the Normans were themselves Germanic, but they had been in contact with Roman law and institutions in France and brought to England a sense of cohesion, a strength of governmental institutions entirely absent from Anglo-Saxon conceptions. It was to take centuries for the local and the central institutions to understand each other and the races to coalesce into one nation. We shall find that the time of this, and the great instrument making it, was the Magna Charta, which will deserve close study for many reasons. But from that time, except so far as a break may be thought of as growng out of civil wars, there was nothing to check the orderly evolution of English institutions. The steps in this evolution will make up the different subjects for our consideration.

Thus, the growth by which the royal courts extended the King's Peace over roads and public places and elsewhere so as to bring all trespassers within their jurisdiction will constitute a legal chapter of great interest. We shall find that Trespass therefore constituted the first ground

for removal of causes from a local to a national court. And after the royal courts acquired their jurisdiction the lawyers found means of developing even out of Trespass a system of contractual relations. The story of Assumpsit in its different forms marked this evolution. On the other hand, subjects of fraud, accident and mistake, beginning with Uses and culminating in Trusts, brought about the development of a court of a different nature and yet of equal power with the common law courts, for it was thus that Chancery or Equity came into existence.

Incidental but important we shall find the study of great statutes when Parliament came into being, and indeed before, but one of the striking elements of common law development is that it was due not at all to the king and very little to parliament; it was the judges and the lawyers, with their incessant study and discussion, who developed the Common Law. Some of the great judges we shall study, as well as the reporters who made their decisions public, and the Inns of Court also from which came judges, lawyers and reporters alike, in a purely English development of law. And yet we shall find late in this evolution the introduction of a new form of law, Commercial Law, on the initiative of courts themselves. For the new position of England in the world after the contest with France caused such a gowth of commerce that it almost exceeded in importance the land rules which had previously been the chief branch of law on the island.

And all this time, with little change ran the parallel life of the law of Domestic Relations. This centered about the Family the great institution of **Status**, stablizing the growth of **Contract**.

England continued the evolution of the Common Law in a form which suited her own conditions, but there came now in her colonial development a transmigration of the Common Law to other continents and other climates. This constitutes a break or a change even greater than that of the Norman Conquest, but it was not now the fusion of two systems of law, as then; it was the development of common law principles under new conditions and solving

new problems. The transmigration of the Common Law to America gives rise to a new legal evolution. We shall study the Common Law in the English colonies and by way of contrast will consider briefly also Latin colonial law on the Gulf of Mexico and further south. The Age of Independence will be found to bring special features of legal growth, as will the extension of colonization from the seaboard to the great West and Southwest. Geographically it was the Mississippi Valley, typically it was the Log Cabin, that brought a new phase of the Common Law.

Even America, however, became consolidated like the other nations of the world and had its age of codification, —only partially carried out it is true in comparison with what was done in Europe, but still important. And this consolidation, whether of government or of local institutions, came to head with the Civil War; so that a great red line may be drawn in law as well as in history for those four eventful years and the Reconstruction which followed.

Such will be the course which we shall study. If we are successful in apprehending what is here merely outlined, we shall learn that the Common Law is not merely a set of arbitrary rules, as it sometimes appears, but the source of legal principles which is building up a system of private law as well as public for what we must consider the greatest racial stock on the globe, the Anglo-American. We shall find that it consists in the gradual emergence of individualism from primitive savage communism until it developed the most individualist civilization on the globe. Whether the unity of the world, the common needs of all humanity, the intercourse of races in commerce, the development of classes and individuals themselves do not call for some form of socialization to modify the old individualism, is a problem which will conclude our course.

II

ANGLO-SAXON LAW

This, then, is first what I will; that every man be worthy of folk right, as well poor as rich; and that righteous dooms be judged to him.—Secular Ordinance of Edgar.

Authorities.—H. C. Lodge, **et al.**, Essays in Anglo-Saxon Law. F. Seebohm, Tribal Custom in Anglo-Saxon Law. Kemble, **Codex Diplomaticus**. F. Liebermann, **Gesetz der Angel-Sachsen**. F. W. Maitland, Domesday Book and Beyond. J. R. Green, Short History of the English People. A. Mitchell, The Past in the Present. F. Seebohm, The English Village Community. Chas. Elton, Origins of English History. G. L. Gomme, Folklore as a Historical Science.

When we speak of Law, we speak of the State. Law and State are almost two words for the same thing. Both come into being when writing in some form becomes known; neither prevails before the invention of writing. The reason is not far to seek. Unless there is some method of communicating the rules of conduct,—which is another way of saying law,—there can be no human association beyond that of actual contact, that is to say, little groups composed of kindred or neighbors. So that State, Law and Writing go together, and we find all three introduced at one time in the island which we now call England.

Nevertheless, the beginnings of Law far antedate the State, and are well worth our study, Law, that is, **Lex**, is something placed by some one; Statute is practically the same thing in a more definite form; but there was something, perhaps indefinite in form but definite in essence, antecedent to both. This was what we call Custom and the Romans called **Mos**. In the absolute beginning of society Custom and Religion, **Mos and Fas**, will be found to be two ways of looking at the same thing; but we are to study the Anglo-Saxons in their new home, and for our purposes the beginnngs of Custom may be left to one side.

In southern Europe we find the Clan or Gens traceable even in historical times. The first human association, before marriage came to exist in any of the forms with which we are familiar, when kinship was traceable only through the mother, was when mankind was gathered in kindred groups which we call Clans. An injury to a member of the Clan was an injury to the Clan itself, punished by blood feud or vendetta. The association of Clans into local groups or communities came to bear the name of Tribe, and, as the intermarriage between Clans only was the customary method, the Tribe members were largely kindred also, but cognatic,—that is, embracing kindred on the father's side as well as the mother's. Tribal custom is therefore a later development, for the kinship within the Clan or **Gens** was

on one side, generally that of the mother, and called agnatic. In regular development kindred and all that goes with Tribes located near each other in one river valley or otherwise. Hence the importance in private law of the **Gens**, and hence the care with which it has been studied among the Greeks and Romans. Hence also the interest it awakens to find the same system so far flung as to prevail among the Celts of Scotland, the Arabs of the south, and the American Indians, whom we may suppose came originally from the Mongols of Asia.

In Britain under the Romans law had become definite and written. Theodosius had reigned and given his code, although the legislation of Justinian was never to be known in the island. The divisions of private law into Persons, Family, Successions, Property and Obligations could have been studied under the great Papinian himself at the Roman capital of York as well as in our own time under Windscheid at Leipzig. The legal system was practically complete, for the radical change had been accomplished from agnatism to cognatism. Under the Praetors the individual had largely succeeded to the group. But while we can trace public buildings, and even private villas, while we dig up Roman coins and material remains, we find no principle of Roman law in English institutions. We even cannot trace the gentile system, kindred by clan. The Anglo-Saxons had not only outgrown this before they came within the ken of history, but they did not adopt it now from the Romanized Briton. Indeed it is remarkable that the northern races, the Teutonic, show little trace of the clan, in direct contrast to the Graeco-Italic branch of the Aryan family.

It would seem, therefore, despite the guesses of some Romanists in England, that the Anglo-Saxon conquest of Britain was much like the Anglo-Saxon conquest of America many centuries later. There would seem to have been little mixture of races. There was either an extermination of the older race which has been the general view, or an absolute subjugation of the Britons until they were nothing but slaves, without legal rights. A careful reading of Bede tends to show that the latter view is correct and not the

former, and the minute study of land laws and customs seems likewise to show the survival of much going back even before the Romans. The Village Community was formerly connected with the Mark and from Von Maurer to Sir Henry Maine was considered a Teutonic survival. We are now beginning to think of it as a fundamental human institution brought to Britain by that original Iberian race which probably set up the great stones at Stonehenge and elsewhere. Even more certainly the closed field agriculture, in which each man had an interest in different strips to equalize holdings, dates back of the Romans. What is called Borough English descent, by which the youngest child inherits the homestead, is found to go back to the nomadic time when the older children left the home to found colonies of their own, and is true in different parts of the world to the present day. Gavelkind descent in Kent, by which all children received equal shares, is more likely Anglo-Saxon, for primogeniture came only under the Normans.

At all events, not only did slavery prevail to a greater extent as one progressed eastwardly into the more fully subdued parts of Britain, but the prevalence of different customs, whether as to land or descent, in different parts of the island points to the fact that even the Romans had not changed the primitive customs of the Britons themselves. And the same result followed the Anglo-Saxon invasion, complete as it was in public law.

Public law grew out of tribal life and tribal leagues. It assumed different forms in different places. The eastern coast, which was settled mainly by the Angles, was subsequently subdued by the Danes, and presents different customs, public and private, and yet fundamentally the same with the rest of England. In private custom it all begins with the **wergeld**, or group compensation for what was considered as group injuries. The earliest law of the invading Anglo-Saxon as well as the latest regulation of the Danish Canute in the east relate to this subject. The introduction of Christianity in A. D. 597 and its gradual spread over the whole island, the use of writing by the monks, and even their teaching of better agriculture, of which we have such

interesting examples from the time of Bede, only varied the form of this fundamental Teutonic institution. It was the original cause of action, it was the origin of all other causes of action. It was the Teutonic form or Trespass, and from it was to originate the whole subject of Obligations under the Anglo-Saxons. The other branches of private law were to have less distinct connection with it, but everything was more or less influenced by Trespass under its original form of **wergeld**.

All human relations concern Persons and Property, for there is no society until these are recognized as the basis of human life. Whether it be unwritten custom or written law, the five divisions of Persons, Family, Successions, Property and Obligations may be traced, although their forms differ at different stages of culture. So it was in Anglo-Saxon England.

The law of Persons and Family, as well as Succession and Property, no doubt go back to some obliterated clan system, as with other Aryan races. But the fact that the Anglo-Saxons came few at a time, although many in course of time, broke up whatever clan system still existed on the mainland,—if any was traceable even there,—and made a recasting necessary of the group which was the basis. In other words, the Anglo-Saxon kindred group was something different from that of the Teutons at home, and gave place to the use of institutions based either upon locality or upon number. The figure 100 for some reason has always had a fascination for the human race and so it had for these invanders of Britain. Their companies of soldiers seem to have been in hundreds, their settlements in some places by hundreds, and consequently the court which was the assembly of the adult freemen was called the Hundred. This can be paralleled on the continent, but in England it assumed a special place, and this court it was which gave the tone to much of the Anglo-Saxon social development. The Tribe in England as elsewhere is only a temporary institution. It gives way ultimately to the State, and the Hundred it was which became for many purposes the basis of English judicial development. The procedure was primi-

tive enough. The plaintiff seized the defendant and conducted him to the assembly, where the complaint was sworn to by the plaintiff and his friends. There was no trial in the modern sense of the word, no witnesses, no examination. The plaintiff was backed up by those he brought to swear to his credibility. The judgment was supposed to be by God himself. The defendant went through an ordeal, generally of fire or water, surviving from primitive times. Whether trial by battle was Anglo-Saxon is disputed, but it must have been used, for it is the primitive mode of self-help. Getting a man to submit even to divine judgment is itself an advance on blood feud.

There were, therefore, no court officials, for it was all a submission to the judgment of God. If the defendant survived the ordeal and would not perform his judgment, he was banished from the community,—an excommunication which brought with it wandering in the wild woods among wilder enemies. Of this we still have reminder in contempt proceedings. A sheriff did not exist,—but a sheriff was not needed.

In these early times, therefore, there was no question except that of keeping order. Little property existed. What grain there was, was for immediate consumption, and cattle constituted almost the only form of property. Land was practically in common except the immediate house and yard of each family.

With the conversion of England, great changes came, but after all the changes were built upon the primitive conditions. The principal thing was that the Church brought writing and the Church brought also it Roman zeal for acquiring lands. This no doubt was a public blessing, for the Church, particularly the Benedictines, cleared the lands and extended agriculture. Grain had been brought by the Mediterraneans, the vine by the Romans, and the monks now introduced boundaries, written titles, and settled institutions. The kings would buy peace of soul by granting extensive lands to the different monasteries, and these would protect their sub-conveyances by crosses instead of signatures; for the cross imported a bishop's curse upon any one

violating the contests. The royal grant carried with it not only ownership, which the church made more and more like the Roman **dominium** and less and less like the popular community possession, but also a right of holding court of its own, distinct from that of the Hundred of the people. This was called the right of **sac and soc**, that is, jurisdiction and the fees which went with it. A great innovation of the church, and one of lasting importance, was that the written titles or **boes** became evidence used in court, and thus the introduction of a rational mode of proof instead of leaving all to the judgment of God we owe, curiously enough, to the Church of God. Indeed the bishop sat beside the alderman in the popular courts also, and the greatest civilizing influence of Saxon times we may say was the Church. The Church not only taught a better agriculture, but it taught the nobility of work and to the Church was largely due the gradual change we find among the Saxons from fighting warriors to peaceful agriculturists who could adopt the land customs of the east and Mediterranean race. To the Church was due writing, and from the age of Alfred and Canute came written laws. These had begun to supersede custom long before, but were now digested into something like codes, much like the **Leges Barbarorum** on the continent. To the influence of the common church was due also much of the **rapproachment** with the people of the country now shaping itself as France. On both sides of the channel the Church brought not only a common religion, but also such civilizing influences as had come down from Rome and even Greece. From the **Bocs** of the church originated the **Boes** of the nobles, who began to have separate domains of their own, and on these not only can we trace the local influences which were to cluster about the manor instead of the hide, but the beginnings of Feudalism in England as well as on the continent.

It is true the State was not centralized and here was a contrast between England and France, and here the possibility of change; but even among the Saxons at least tribe and clan alike had disappeared and the grouping once due to kind was re-forming about a local nobility. Individualism

was clearly growing up, and civil relations were dwarfing the law of crimes. Saxon law began with **wergeld**, it remained the product of local customs, but law had come to cover all private relations.

III

WHAT THE NORMANS BROUGHT

Tot formulae brevium, quot sunt genera actionum.—Bracton.

Authorities.— M. M. Bigelow, **Placita Anglo-Normannica.** R. Glanville, **Tractatus de legibus et consuetudinibus regni Angliae. Leges Henrici.** H. Brunner, **Entstehung der Schwurgerichte.**

Bunsen wrote a notable book which he called **God in History**, and there can be no doubt that its thesis is true. There is a providence that shapes our ends, whether these be individual or community; and among the most remarkable steps in this development is the movement of races, the Auswanderung, which accompanied and indeed caused the fall of the Roman Empire. This threw the Teutonic races across the Rhine and the Danube and perhaps had its origin in Mongol centres of population in Asia; but there was another from Scandinavia which, following later, has also left momentous consequences.

The expeditions of the vikings were due to the pressure of population upon the scant resources of the north, and accentuated by the success of their German brethren between the Rhine and the Oder. One feature was the Danish conquest of England from its eastern coast, and others resulted from the harrying of the continent from the Rhine to the Straits of Messina. But the result went further. The kingdom of the two Sicilies was a brilliant memorial of the work of Robert Guiscard and his kindred which influenced the whole Mediterranean story.

More lasting was that movement centering in the Seine and which not only settled the Normans in a country named for them, but enabled them to incline the balance of power between the eastern Franks and those about Paris in favor of the latter and thus give the development of France over to the Teutons of the west, already permeated by Romance if not Roman civilization. For our purposes the important effect was that upon the Normans themselves. While they became the rulers of Normandy and their Dukes and nobility ruled the country from their castles, they had brought so little from the north that they readily adopted the culture which they found around them.

In other words, the occupation of Normandy was rather a change of rulers than a change of law for the old inhabitants, and even the rulers found that the method of

government which had come down through Charlemagne from the Roman Empire was best suited to their needs. Not that the Teutonic invasion had not affected northern Gaul, although to a less degree that nearer the Rhine. Local customs, some of them even ante-Roman, remained in different districts, and were ultimately to be compiled into the **Grand Costunmier**, one of the most remarkable of the **Costumes** of France. Nevertheless the Roman law had been pervasive here as elsewhere and the Northmen willingly accomodated themselves to a more civilized system than that to which they were accustomed. Here, as everywhere else, law concerned Persons and Property, and, modified by growing Feudalism, law could be traced in the five great branches of Persons, Family, Successions, Property, and Obligations. Here much more than in their northern homes, however, obligations were tending from the old rules of trespass and wergeld towards those contractual relations whose development makes up progress.

Brunner has shown how the Carolingian procedure had combined the Roman **inquisitio** with popular custom, how especially for fiscal purposes the central judge called upon old residents for information as to facts. From this was to come the **enquete** which plays so marked a feature in French law; and it is a striking contrast which shows the same legal procedure developing into the religious Inquisition of the south of France and Spain, and on the other hand on English soil giving rise to trial by jury. But it is of the sub-migration of the Normans from France to England that we must speak.

The claims of William to succeed Edward the Confessor are immaterial for our purposes. Suffice it that he did succeed him by means of the Norman Conquest, itself a gradual process, only beginning with the Battle of Hastings in 1066. Much the same result followed as when the Northmen settled in France, for the population was not changed and the main result was a new king and a new nobility, intruding themselves, however, into all parts of the island. A new type of character came into England with the Nor-

mans, moreover, for to the plodding and almost dull Anglo-Saxon population was now added a more sprightly element. It is true that the Northmen and the Saxons were of similar origin, but a century residence in contact with civil laws and its institutions had materially changed the Normans. The Norman duke acquired England for himself, however, and not as a feudatory of the French king; so that while he forfeited the estates of English nobles and gave them to his own followers, there was little disturbance of popular institutions. He brought new churchmen, possibly of greater calibre, as in the case of Anselm; but it was after all still the Roman church, and there was little change in popular institutions, ecclesiastical or secular. The traditions of Robin Hood show the hostility of the old Saxons to the new invaders, but it was personal and local and did not give rise to civil war. The measures taken by the Norman rulers were too effective for that to be possible. The adoption of Norman names showed friendly contact. The period is one of the substitution of centralized government brought from Romanized France, but nevertheless of the continued existence of local law and institutions.

After England had been fairly conquered William did two things of prime importance in legal development. In the first place, he exacted at Old Sarum from all the nobility, great and small, a direct oath of allegiance to himself, and thus prevented the rise of local feudal powers which might become hostile to the king. In the same year, 1086, he ordered for fiscal purposes a survey of all English lands and property to contain a memorandum of ownership and condition in the time of Edward the Confessor. For this he used the **inquisitio** which had become familiar to the Normans upon the continent and introduced into England a procedure which was to be of great assistance to the central government and at the same time unwittingly to aid in the development of local institutions. The resulting Doomsday Book is not only the most remarkable document of its kind in English history, giving the clearest of all surveys of its

lands and institutions, but it stands alone in the story of European development. To it there is nothing equal upon the continent.

William also made two changes in official procedure which proved of lasting importance. Thus, he removed the bishop from the popular courts, and gave both the popular and the ecclesiastical tribunals opportunity for separate development. On the other hand, he gave the sheriff, **baillivus**, power to hold local courts, and imposed on him the executive functions which had been entirely lacking in Saxon justice.

It was under the grandson of the Conqueror, Henry II, that the English courts were set upon their course of development. Thus he extended the use of the **inquisitio** to legal questions. These were primarily fiscal, but in the uncertainty of titles growing out of the Norman changes his Assize of Novel Disseisin for land, with an equivalent for church matters, marked an epoch when active royal judges made more and more use of local authorities. There writs related to title, not merely to possession, and were triable by battle or other appeal to the Supreme Judge; but they involved the use of the **inquisitio** by neighbors, in mixed capacity of witnesses and doomsmen, in incidental questions. Henry's dispute with the church blasted his own life, but the movement he set on foot was lasting. There even came to be an advance in substantive law as distinguished from procedure. Glanville wrote his famous book "De Legibus" and succeeded in introducing permanently much Roman law into England, such as on the subject of servitudes and in making land law more definite, but many other of his novelties proved unproductive. The English spirit adopted what was needful from the Roman law but absolutely rejected the classical sense of form and proportion. The development of English law was to come not from law writers but from cases after the rise of a profession of lawyers. And this was not yet.

Doomsday Book gives as the local basis the sub-division of land known as the **villa**, and what the **villa** was has

caused great controversy. Probably Maitland is the highest authority, and his general conclusion is that a **villa**, using the Roman terminology, is largely the same as the manor which had already existed under the Saxons. The manor, therefore, the predominant local institution, combined in the hands of the local baron or lord both ownership of land and a quasi-sovereignty over the inhabitants. On the one side it seems to have been, as Seebohm calls it, the village community under a lord,—a kind of subjugated village community,—preserving the old rules as to the soil and its use. The free inhabitants met together in what was called the customary court of the manor under the presidency of the lord's steward on bailiff and decided when plowing should commence, what furlongs should belong to this tenant and what to another, the division of land so that every tenant had an equal division of high and low, fertile and rocky soil, and other questions of agriculture. This probably represents the original village community. The police side of local life was seen in the court leet, which was made up of the same men exercising a different jurisdiction. Here the family responsibility for offenses appeared, neighbors gave surety or frank pledge for each other or for strangers, crimes were punished and what was left of the **wergeld** system was enforced. And there was still a third side to this local tribunal in the court baron, where all questions were adjusted between the tenant as a soldier and his baron or lord; for so many hides were to furnish a foot soldier, so many a mounted knight. Gradually a change of tenant was allowed upon payment of a relief to the lord, or upon the tenant's death lands were permitted to be held by his oldest son upon like terms, and the claims of the widow protected. It is not too much to say that this local court, possibly the survivor of the old Hundred, with outlook limited to local matters but with its view fixed clearly upon these, was the origin and nursery of local self-government as we understand it. The lord himself interfered very little, for his interests were military. His life centered in the castle, as it was called in early times, the

more peaceful manor house as it later came to be. The bailiff was rather a civil than a military agent, and represented the people quite as much as he did the lord. The customs enforced would be different in different parts of England, but they would not differ like the **fueros** of Spain. They were not written and were transmitted by the memory alone, aided, after the more general use of writing, by the manor rolls or rude records which now remain, among the most interesting of English antiquities.

Writing as yet, however, was almost unknown. The clergy could write, but the nobility must needs use a seal stamped with their heraldic devices in order to identify themselves and documents. England was made up of manors and villages, on the rivers, for roads were few and shops except those of blacksmith and similar artisans were almost wanting. The **trinoda necesitas** of this feudal age called for the repair of castles, service in the field, and building of roads and bridges for military purposes, although at best these were rude and little suited for any other use. The inns and shops, where there were any, did not bear the owner's name but some fanciful design, such as the castle or lion or swan, to identify them. Indeed, before the Norman Conquest and its changes in customs, no one had even a name except that given him at baptism. John might be called Black from his dark color, or Mary might be called White for a similar reason, but these titles were largely personal and not often perpetuated. Business as it grew, however, began to give more permanent surnames. Many came from the dominent occupation of wool-raising and shipping through the staple ports to the Netherlands for manufacture in the few years in which there was not war. Shepherd, woolman, carver, steward, webster (weaver), mason, fuller, walker, dyer, tailor, carpenter and similar appellations tended to become permanent for occupations descended in the families, and in course of time names connected with places, such as **ham, ville, ton,** even better supplied what came to be called family names.

Upon the whole, therefore, Norman England was made

up of two parts. On the one side was the feudal nobility, speaking French, living in castles, and having war as its principal occupation. On the other hand were the body of people gatherered in villages about manors speaking English, engaged in peaceful agriculture or wool-raising, and made up of the old Anglo-Saxons, to whom the lower class of barons were more and more approximating. If the Normans furnished the government, with centralized institutions, it rested upon a vastly larger popular local sub-stratum. The two co-existed, and the problem was to combined the two in one. The feudal and the popular elements were equally essential, but it was neeessary to unify them in order to have one country.

IV

MAGNA CHARTA

It is called Magna Charta, not for the length or largeness of it, but it is called the Great Charter in respect of the great weightiness and weighty greatness of the matter contained in it in few words, being the fountain of all the fundamental laws of the realm.—Sir Edward Coke.

Authorities.—Text in Historical Essay on Magna Charta, Richard Thompson. H. de Bracton, **De legibus et consuetudinibus Angliae**. F. W. Maitland, Bracton's Note Book. Wm. Stubbs, Select Charters. Constitutional History of England.

While the common people were carrying on the ordinary business of life, whether agricultural or connected with wool, their customs varying from the thickly settled eastern part of England to the thinly settled western countries, a political development was also going on among the Norman upper classes. These were made up largely of nobility and clergy, gradually, on account of intermarriage, becoming mixed with the Saxons. The king was not only the largest land owner, but, on account of the oath at Old Sarum, was sovereign of every piece of land in the kingdom. Of these kings, John was one of the most active, and through his activity abroad he lost to France the ancient domain of Normandy. In England the same activity brought him in conflict with his greater nobles, and in particular with Langton, the Archbishop of Canterbury and representative of the church. John carried further all the centralizing aims of his predecessors, coming more in conflict all the time with the nobles.

Finally, Langton assembled many of these at St. Pauls in London and they agreed upon what must be exacted of the king. Acting together, they had the larger army and compelled John to meet them near Windsor at Runnymede,—a meadow through which ran a stream. There on the 15th of June, 1215, he agreed to the Magna Charta, essentially a political document, but which ran in favor of the common people as well as the nobility, and incidentally throws light on the civil law of the day. It is in this last respect that it is of value to us at present.

It is in Latin and afterwards was divided into 63 chapters, to which still hang the seals of John, the Archbishop and the Barons. Four copies still exist, and no lover of mankind can look upon one of them without emotion.

The first chapter relates to the church, which figures also later, and Jewish money lenders, customs of merchants, foreigners, the rights of the City London, the institution of justice, and the re-foresting of recent enclosures occupy succeeding chapters. The Magna Charta is not a declara-

tion of old rights, it is not the institution of new rights; it is in form a restraint which the king places upon the exercise of his powers for the benefit of his people. It is thus in the shape of prohibitions, which mark the form of organic laws from the Ten Commandments down to the American Constitution. There were other charters even in England before and afterwards, but this became the Magna Charta, as Coke says, the Great Charter because of its contents, not of its length. It is the foundation of English law, because it carried with it an institution which made it self-executing. It was thus an example of the English as opposed to the continental mode of procedure; it not only exhibited principles, but created an organism by which these principles were carried into effect. The committee of twenty-five barons mentioned all through the instrument is described in detail towards the end, in what under later recensions became chapter 61. This commission was self-perpetuating, held possession of the Tower of London and sundry royal castles, and were authorized to keep an army ready to fall upon the king in case of his not carrying out within forty days any redress provided for in the instrument itself, although the persons of the royal family and the king's own property were to remain inviolate. By a strange irony almost the next chapter is very amicable and declares the forgiveness of all past offenses.

All this was on the political side of the document. There were some parts which proved valuable in private law as well as public law. Possibly the provision most important was that in the seventeenth chapter, which declared that common pleas, **communia placita**, should no longer follow the king, which resulted in the establishment of that court at Westminster, where it was held in the great hall of William Rufus. There are other provisions as to procedure, for Henry II's **inquisitio** is mentioned several times. The royal writ, **breve**, as in the time of the Conqueror, as well as in our own day, instituted all suits. The writs of Novel Disseisin and the like must not be tried where the king happened to be, but where the land lay. One of the few unfortunate provisions of the charter is that forbid-

ding the writ of praecipe in land matters, which hampered the development of the jurisdiction of the royal courts. The provision, however, was no doubt necessary as the royal courts were administered under King John.

Valuable and far-reaching, as the future was to show, were the declarations in chapters 20 and 21 that trial must be by the peers of the accused, and in chapter 39 that "no freeman shall be seized or imprisoned or dispossessed or outlawed or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, pares, or by the law of the land." Of the same character was the provision in the next chapter that "to none will we sell, to none will we deny, to none will we delay right or justice." It is not too much to say that on these hangs the Common Law, particularly as it was provided shortly afterwards that no judges, and indeed no officers connected with the courts, would be appointed excepting such as know the laws of the land and are well disposed to observe them. Parliament was not to assume a definite shape for fifty years, but its prophecy is found when the common council of the kingdom was declared to be the only power to assess taxes not already fixed by feudal custom. Incidentally the Magna Charta marks the point of divergence in the judicial development of France and England. On the continent the **ballivus, bailli,** was to become the principal judge, while in England it was now provided that this officer, also called the sheriff, could no longer hold court; which had the result that he has become restricted to administative duties.

In form the Magna Charta is a contract between the king and his greater barons; in point of fact, chapter 60 extends its provisions so that these barons are themselves governed by it in relation to their subordinates. This it is which makes the Magna Charta a national document. The instrument is of value also in its references to private law, for the feudal relations then prevalent touched almost all persons and all things in life. The king was restricted to the ordinary reliefs or gifts prescribed by feudal law upon the accession of a new tenant by death or other-

wise, and these changes of possession brought about incidental rules which were afterwards expanded in the growing Common Law. One of the peculiarities of England has been the existence of the executor of a will or administrator of an estate of decedent leaving no will. In Civil Law these duties, strictly speaking, are performed by the heir Magna Charta incidentally mentions executors and provides that debts must be paid before the division of a decedent's estate among his legatees. This would seem to be a recognition of the procedure of the Canon Law, for the executor is clearly recognized therein. The widow's dower and quarantine are expressly recognized, although their origin is obscure. They are not found in the Canon Law and must be sought for in Germanic customs. Indeed the **douaire**, or interest of a wife in the husband's property, as opposed to the **dos** which she brought to the husband under the Civil Law, may be found in the Contumes of France, where as now it amounted to a third interest in the husband's lands. The Canon Law was never a favorite in England, but it claimed jurisdiction, through its courts and officers, of wills, estates of decedents, marriage and divorce, legitimacy and other family questions. Nor were these claims disregarded, for the ecclesiastical courts exercised jurisdiction to the exclusion of the Common Law tribunals. Church courts were to be reformed only when religion itself was reformed, and even then to continue in existence.

We have at present even less to do with criminal law than with Canon Law, but may note that Magna Charta gives almost a definition of felony when it speaks of felons as those whose lands are forfeited to the king and goes to provide that the royal rights are limited to a year and a day; after that the immediate lord of the tenant took possession of the forfeited property. Misdemeanors were not yet known, and came in under the Tudors, with their arbitrary methods. On the other hand the growing importance of trade is seen in the direction that weirs in navigable rivers must be destroyed, even if this did interfere with the fishery rights of kings and nobles alike. But merchants and traders were even now becoming more and

more common, and this was to lead to the development of roads under royal protection, although they are not mentioned in Magna Charta except as implied in rights of merchants to travel over England by land and water. Uniform weights and measures are expressly established and are to be enforced by royal authority.

At first blush it may seem strange that the fundamental charter of English liberties should be written in Latin. It was indeed too early to expect it to be written in English; for the period was that of the highest development of the Norman-French speech introduced by the Conqueror. This was not only spoken at court, but by the nobles and in the legal tribunals, where it has left lasting traces. Indeed it was to be the principal language of England down to the Black Death over a century after Magna Charta. Latin was used because it was still, as under the Saxons as well as the French, the official language of royal grants and documents, and it was to continue long after Parliament came to flourish.

It is true that the wording of Magna Charta would not be owned by Cicero, or by Gaius and other writers of the Silver Age of Roman law. It contained many feudal terms with a fomal Lating ending. Nevertheless it was Latin, the Latin of the days of Charlemagne, Innocent and Edward, and was the most exact mode of expression which could have been employed. And after all it does not seem inappropriate that the greatest of all modern legal papers should be in the language of the Twelve Tables and the Code of Justinian.

V

THE AGE OF TRESPASS

The tresspass was complained of and dealt with as a punishable breach of the King's peace, and the plaintiff was bound to allege force and arms and breach of the peace in order to give the King's court jurisdiction.—Sir Frederick Pollock

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Authorities: W. S. Holdsworth, the Year Books. The Year Books, Ed. Horwood and Pike; also ed. F. W. Maitland. H. J. Stephen, Treatise on the Principles of Pleading. Select Essays in Anglo-American Legal History.

The thirteenth century was famous for other things than Magna Charta, for it was then that the Middle Ages began to break through the contact of western Europe with western Asia. The Crusades were bringing a new kind of enlightenment, by which men turned from philosophy to external matters.

It brought a kind of revival of learning, including that of Roman Law. The beginning of states received a direction from the imperial rule that the will of the King had the force of law. It was in this way that in England the kings were able to direct the development of private law. Royal government had begun in fiscal matters, but as trade increased it was extended also to private affairs. Roads became better and more extended, and the jurisdiction of the king's courts was extended not only to markets but to the king's highways connecting them. The legislation of Henry II, if not of the Conqueror himself, had brought all questions of title into the royal courts; now a means was to be found for bringing the growing subject of private contracts within the same jurisdiction. This as usual was to be done by the means of procedure.

Not but that the royal authority showed itself in legislation. The Parliament had been created in order to gain the assent of towns to new forms of taxation, and the king used it afterwards for other purposes. The age of Edward I indeed was one of the most remarkable in English history, both for his military and his legislative activity. He endeavored to control the church by means of a statute of Mortmain, and the two statutes of **Quia Emptores** and **De Donis**, while endeavoring to make conveyances more simple, resulted in the establishment of entailment. More important for our present purposes was that of A. D. 1285, **Consimili Casu,** whose object was to enforce the issue by the king's clerk or chancellor of the writ, **breve,** for the trial by the courts of all cases similar to those already within their jurisdiction. Unfortunately strict construction of this act led to the creation of what

we know as the separate jurisdiction of the court of chancery. Immediately, however, it stimulated the activity of the courts along certain lines.

All suits originate in regard to things. Even where a person is concerned he is concerned in regard to property which he claims. Agreements or contracts come later. This is equally true of the local courts and of the royal courts, but there came to be a competition between the two classes of jurisdiction. The royal courts increased their activity by claiming jurisdiction of all matters in which the king's peace was involved. This was an extention of the old Saxon idea of **mund**, but it was an extension which brought all classes of litigation within the jurisdiction of the royal tribunals. If there was a dispute upon the highway, that necessarily went into the royal court. The same was true of the markets, which were specially within the protection of the king. Even disputes between private persons by an untraversible allegation of trespass came also before the king's judges. The ingenuity of these judges was great, and soon the royal courts were trying in their circuits all questions of fact, and questions of law were settled in joint session at Westminster Hall. The Exchequer had led the way in matters of taxes, the King's Bench had followed suit as to trespasses, and the Common Pleas soon had quite as extensive jurisdiction; but in course of time the distinction between the three courts were to be almost obliterated.

Maitland shows by a graphic diagram how trespass **vi et armis** branched out from the old criminal procedure shortly after Magna Charta, and then itself divided into several branches under the Edwards. How from trespass originated case and absumpsit is an important matter which will require separate treatment. Trespass, however, has kept on its long history until the present day.

The extent of litigation may be found in the beginning of that remarkable series of reports which is at once the distinction and glory of English law, in the Year Books. Not that these assumed the authoritative rank of later reports, for it is said that authority can be found there on

both sides of every proposition discussed. Nor are they satisfactory regarded as records, for they are mainly colloquies between the bench and bar. But they mark the settlement of the principle on the one side that the king cannot interfere in law matters, and on the other that there is nothing to which the jurisdiction of the courts does not extend. Perhaps more important yet is the fact that the court is made up both of bench and bar, that the bench is aided by discussions pro and con by the brightest minds of the day, so that the decision of the court is that of an absolutely unbiassed body of men seeking to obtain the right by means of free discussion. In such a court we have not only the creator of the Common Law, but of English liberty in all its forms.

The reign of Edward III was longer than that of his grandfather and his rule extended from the Orkneys in the north to the Pyrenees on the south, while his son, the Black Prince, fought for the crown of Castile. Internal affairs, however, are more important for us. What is called the Black Death, that great invasion of Europe by the cholera from the east, is the social and economic turning point in English history. So few tenants were left that instead of military tenures we have the definite beginning of leasehold in the modern sense, while the spiritual disturbance found its culmination in the preaching of Wycliff and the extension of Lollardny. Socially this is summed up in Chaucer, who not only begins modern English, but his characters show the England of that day from the lawyer to the ecclesiastic, from the highest to the lowest class woman, in a way never since surpassed.

It was in such an England that the old remedies of replevin, trover and debt for things gave way to the trespass which was to be extended to include contract as well as tort. The king's court had a true executive in the sheriff, but the greatest change of all was the development of the jury. We have seen this originating in the **inquisitio** brought by the Normans, whereby the court summoned old residents of the vicinage to testify as to facts. This was done not by an original writ but by a judicial writ issued by

the court drawing the trial. Perhaps it is not until the Year Book of the thirty-third year of Edward III that there is record of a jury deciding on evidence in addition to their own knowledge. Certainly by the reign of Henry IV evidence was introduced on the issue and trial had as at present. Unanimity was not at first exacted, for this would have been impossible in a jury consisting really of witnesses, but by the time of Edward IV unanimity in the verdict was the rule. Beginning, therefore, with the **inquisitio**, particularly as described under the second Henry, and mentioned for the first time distinctly in the Constitutions of Clarendon, the jury, although of foreign origin, came to be an essential and perhaps we may say the distinctive English institution. And this is quite English. It has never made any difference where a word or a thing came from if that word or thing was needed. It has been adopted with such changes as made it adequate to native needs, and it has become English in all respects. And the jury in some ways is English even in origin, for it is the body of doomsmen, long existing in the Courts of the Manor or the earlier Village Community, transferred in the form of the **sectæ** to the royal court, and gradually transformed from compurgators and witnesses into triers of fact. The result marked the union of centralized strength with localized liberty, which is the glory of Anglo-Saxon civilization.

With the jury system also came that important title or body of law which we know as Evidence. Admirable as was Roman law in many respects, it did not develop a satisfactory system as to testimony. The trial of facts was referred by the **praetor** to a **judex** and he was left to his own devices in securing evidence. There was no distinction between direct and hearsay, and the use of torture, except to Roman citizens, became common, as we find even in New Testament times. As the ecclesiastical courts acted upon the conscience, they continued the use of torture, or the question, as it is called; and it was the ecclesistical courts which bridge the long interval between the Code of Justinian and the rise of modern systems of law. In England some of the kinds of trial were from the most ancient

times really a reference to the deity, and the ordeals were themselves a kind of torture. It is true that even among the Anglo-Saxons the introduction of written documents supplied a rational mode of proof in some cases, and the same year with Magna Charta the Council of the Lateran abolished ordeals. The growth of the jury, therefore, called for new methods, not only to convince common and often unlettered men, but such as an acute profession of lawyers thought appropriate to the different issues and the different types of jurymen. It was the jury, therefore, which necessitated the English system of pleading so as to present but one point or issue for trial; and it was the needs of the jury also which developed the law of Evidence. And it is by no means a simple title; its rules and exceptions are intricate. But it is a practical system designed to convince ordinary men, and to do this it has developed with great acuteness the heads of competency, materiality and credibility of witnesses.

It was the period from the thirteenth to the fifteenth centuries, therefore, which marked a special evolution of the English judicial system and methods. The words tort and trespass are Norman or Latin in origin, but they came to be thoroughly English in use. It was the age of the first system of removal of causes. The royal judges found means thorough the fiction of trespass, theoretically a violation of the king's peace, **vi et armis,** to remove all land cases and very many personal actions from the lord's court, the local manor, to the king's court, which at certain fixed terms was open in each county of the kingdom. And then it was that arose the jury and its incidents.

VI

THE GROWTH OF ASSUMPSIT

The true interest of the topic of Procedure is derived from the manner in which the tribunals have contrived from time to time to effect changes in the substance of the law itself, under cover of merely modifying the methods by which it is enforced.—Sir Henry Holland.

Authorities: J. B. Ames, Legal Essays. J. H. Wigmore, Treatise on the System of Evidence. J. B. Thayer, Preliminary Treatise on Evidence. J. W. Salmond, History of Contract.

We have seen how the royal courts drew jurisdiction from the local courts by means of the fiction of trespass. We must now see what the royal courts did after they acquired jurisdiction.

Not only does substantive law always originate from procedure, but the English development was so long and so continuous as to furnish us a special study in this evolution. The courts had become entirely independent of the royal power, and now the two elements of the court,—the judge and bar,—co-operated to develop the Common Law by means of one form of suit in particular. No less an authority than James Barr Ames has said that Assumpsit is the Common Law. Certainly there would have been no Common Law as we understand it without the remedy of assumpsit. There is no finer example of Maine's rule that procedure secretes law.

Trespass belonged to the royal court. So far was settled. But trespass, **transgressio**, is a delict, which came to be known as a tort, while most of the claims which come to suit sound in contract, arise out of some form of agreement. The difficulty then of trying such claims was that debt, which was the action appropriate, was tried by wager of law, that is to say, by bringing a **secta** of compurgators who swore to the plaintiff's credibility, while under the current evolution both court and bar desired cases tried by the country, that is, by a jury selected from the country. The practical problem, therefore, was how to produce this result in cases of contract; for there was no difficulty in regard to trespass, which was from its nature triable by a jury.

The first experiment, so far as we know, seems to have been made in regard to ferryman. A ferryman undertakes to carry a passenger across a river for hire, and, as this is in nature of a public franchise, the law imposes upon him the duty of doing so after he has so undertaken. If the horse or freight of the passenger is lost in midstream, the repayment of the small amount paid as ferriage will

not be sufficient compensation for the loss. When such a case came before the courts, therefore, they held that the ferryman, being indebted to the passenger for the amount of what was lost, undertook to recompense him.—to use the expression of the day, **Indebitatus assumpsit**. Growing out of a trespass, this was triable by a jury.

The step was easily taken, for the duty involved was one imposed by law and therefore of a public character, and public policy required some such remedy. Later, however, came the case of a surgeon, who undertook to cure a man by an operation, and performed the operation so unskilfully that the patient lost his arm. This was a case between two private individuals, and there was no public duty involved. Could the surgeon be said to have undertaken to respond for damages caused by his own unskilfulness? The conservative would not take the step, and so high an authority as Chief Justice Brian refused to admit that there was any undertaking involved that should go to a jury. Other judges, however, held that the surgeon, too, was indebted and responsible before a jury. This opened the door to all claims. Trespass upon the Special Case had begun just after Edward III, and a century later Assumpsit came into use, about the time of the first Tudors. And now the final step is recorded by Coke in Slade's case, A. D. 1603. (4 Rep. 93a) although Ames thinks the procedure was not rounded off until later. However that may be, from about that time on there has been no difficulty in passing the bridge which leads from trespass to assumpsit; all claims growing out of agreement, express or implied, have been recoverable in this form of suit and trover also soon became common. The extension given to the jurisdiction of the royal courts was incalculable and resulted in their supremacy.

In this way the jury was both cause and effect of common law progress. The wish for a jury trial led to the development of **indebitatus assumpsit**, and the extension of **indebitatus assumpsit** led to the growth of jury trials. The one helped the other, and both became characteristic of the

Common Law. The time from the Wars of the Roses to the accession of the House of Tudor is a dreary one politically, but it is marked by this growth of Common Law and Common Law procedure, and on the other hand the development of the English bar. This explains the hold which case law has in Anglo-American development. In countries receiving their traditions from Rome a fixed code determines all points. As late as the time of Frederick II the code was designed to solve all questions of law, and the few that were not found in the written code were to be settled by a royal commission. This experiment was to prove futile, and the English development was to obtain a footing even on the continent; and reliance upon case law, that is, the preservation of actual cases for the principles which they decide, took its rise and obtained its strength through the growth of **indebitatus assumpsit**

There is a striking resemblance and striking difference between the English method and that at Rome. At Rome there was a hard and fast **Jus Civile,** in which formality, coming down from ancient times, marked all contracts and all procedure. The origin was in that love of form and ceremony, which, if not a branch of religion itself, marks the first step of legal evolution out of the violence of tribal times. But as the Roman people came in contact with older and more cultured nations about the eastern Mediterranean it found that it must rely less upon formality and more upon contract, upon the meeting of mind with mind, which is the essence of commerce. The **praetor,** therefore, when he became vested with the **imperium** of Roman law development, introduced alongside the formal **Jus Civile** a more reasonable **Jus Gentium** based upon the actual agreement of parties. In course of time the **Jus Gentium** completely supplanted the **Jus Civile,** seizing even upon its name, until the Civil Law ceased to be Roman and became universal. Somewhat so was legal history at Westminster. In order to extend the jurisdiction of the royal courts trespass was supposed and even invented, and then in order to bring contracts within the sphere of trespass, and so within the jurisdiction of the jury, the bench and bar united in

finding an agreement to make good the injury which arose out of trespass. Both at Rome and at Westminster the advance was effected by a fiction, and in both cases equity used that fiction to get at the true intent of the parties. At Rome this was done by the autocratic praetor; at Westminster it was done by bench and bar in order to obtain the right to a democratic jury. Both processes were characteristic of the peoples who employed them, and both secured their proposed result.

By the time of the Stuarts **indebitatus assumpsit** had therefore reached its full devlopment. There might be new applications, but the principle had now been firmly established. The Common Law had found its basis and its weapon.

And assumpsit was not only important in itself, but for technical reasons in some cases it became necessary to allege that the undertaking was money paid or something else which amounted to what is now called a valuable consideration. In this way the doctrine of consideration entered the Common Law and has become one of its most marked features. A contract is worthless, is really not a contract, unless based upon a **quid pro quo**. Indeed, this seems so natural that we suppose it to be a universal rule of law. In point of fact, it is not a rule of Civil Law. So little is this appreciated, however, that in turning the Spanish Civil Code into English for use in Porto Rico, the word causa in it was translated "consideration", and this has giving rise to a great deal of misunderstanding. **Causa** means nothing of the sort and never did mean anything of the sort. It could better have been translated as formality, or condition, authorized by law; for it is a survival of the old forms coming down from primitive customs. Originally if a contract was executed by strking hands, or by some other symbolic action, it was binding, regardless of what we would now call consideration. Nevertheless, the word consideration and many doctrines growing from it have become integral parts of the Common Law.

VII

LAND LAW

The conception of an "estate" in lands is a peculiar characteristic of English law.... The conception of a "remainder" is probably peculiar to English law, and is clearly connected with the notions of estate and tenure. —Kenelin E. Digby.

Authorities: K. E. Digby, Intro. to History of the Law of Real Property. Thos. Littleton, Tenures, (Ed. Coke.) Wm. Blackstone, Commentaries. Fitzherbert, **Natura Brevium**. T. Rogers, Work & Wages. Arthur Young, Tours; Annals, etc.

Law, as we have seen, is concerned with persons and property. In the beginning the subject of persons is almost confined to their **status**, and we have seen how slowly the rules as to that variation of property which we call contracts are evolved. Here too, were we to study it, we should find the growth of political science. From all points of view there is a gradual evolution of the individual from the group.

As to property, while land is not the earliest form, for food, clothing and weapons come before private ownership of realty, still it is the basis not only of human property but of human life. In fact the relation of man to land gives rise to much of political law as well as civil law. And it so happens that in England the rules as to use of land have had a long and almost uninterrupted evolution, of which indeed the end is not yet. All industry ultimately goes back to land, for land produces the food upon which human beings live, as in agriculture, and indirectly in the case of animals, which are the object of food. Then again human dwellings are upon land and human industry of all kinds, beginning with that of the smith, miller, cobbler, and weaver of the country villages, is exercised on land, either in country or in town. Town life, however, will not concern us for the present. Commerce is a part of town life and commercial law desrves a separate treatment.

In connection with land we find that use is the determining factor. A man makes the best use of that which he feels is his own, for independence or liberty is the foundation of all other human rights. Connected with use as consequences we find therefore ownership and alienability; indeed use is not complete without them. In English history these three elements are not only intermixed but are connected in a strange way with philosophy. They were fixed for all time, at least in their outlines, by the Norman Conquest which came at the time of the debate between the Realists and Nominalists, whose doctrines in point of fact go

back to the time of Plato and Aristotle. To the Realists abstract names were real things and this was the way it happened that in England the ownership of land came to be looked at not as a legal term, but what Kant would call a **ding an sich**. The technical name came to be Estate, and it has had so much of reality as to distinguish English land law from that of every other country. It was and is not only something in itself, but susceptible of division, as into a life estate and remainders, vested and contigent, possessing many qualities fitting it to the varying circumstances of social life in different ages.

In Feudal times, as in all others, the actual use of land was for cultivation, particularly of wheat, which has been the great English food in every age. There were also vegetables, but roots of all kinds were almost unknown until introduced from Holland, that garden won from the sea, after the Reformation had connected the history of the two countries. One thinks of the castle as the principal thing in Feudalism, but after all the castle rested upon the tenants of the soil. These furnished the infantry, when this came into play but more particularly furnished the food upon which every one lived. These terre-tnants represented the **coloni** of Roman times and were mainly Anglo-Saxon by race. Their development into the yeomen and the middle class is the true story of England. The estate of a baron was in many respects like the plantation of modern times whether in Spanish possessions or in the Southern States. The manor was at first managed directly by the lord through his bailiff, who presided in the different courts which superintended the cultivation of wheat for bread and barley for beer, and the handling of cattle, pigs and poultry in accordance with customs which went back to pre-historic times. The people lived in villages strung out on each side of the primitive road, and went out from their cottages to labor in the fields. In the village the principal industry was that of the smith, but there was also carpenter, and on streams the miller also. They were by no means slaves, even when they were called villeins. They sometimes could not leave the lands, but then they had little incentive to leave the

lands. Each one had a rude home and garden for his family and interest in the furrows, or furlongs, into which the fields were divided by balks or partitions, so as to have his share over the several kinds of land. This form of cultivation would seem to go back to the times of the original village communities. The ownership of the land was in the different barons, for these tenants, even after military duties gave place to copyhold and similar tenures, were hardly thought of as having an ownership in the land.

As roads improved and feudal rules lessened their hold there came two distinct tendencies which controlled the development of land law. The one was that of the barons, who desired to keep land in their families. The other was the tendency, not distantly connected with the growth of trade, which sought to have land alienable. The form of conveyance to one and his heirs, recognizing the right of succession, became common in the twelfth century, but we find under Edward I the statutes **De Donis** and of Westminster II which were designed to prevent the alienation of land and secure entailment in the family. Then it was that remainders of different kinds came into force. Conveyance outside of the family was almost unknown, certainly was not the rule, until after Magna Charta.

Two events, however, occurred in the middle of the fourteenth century which entirely changed the course of land law. Perhaps the more striking, because of its drum and trumpet character, was the Battle of Crecy. There gun-powder was used for the first time in a great battle and it marked the beginning of the decay of the man on horseback. Gunpowder is your great leveller. It makes armor of no use and finds a better mark in horses than in the man on foot. Intimations of this had come earlier in the struggle of the Swiss with Charles the Bold, but it was the period from Crecy to Elizabeth that marked the end of Feudalism. The process was gradual, and was accompanied by the attraction of feudal nobles from their country lands to the central court, with all its brilliancy. It was under Elizabeth that the use of the bow was finally abolished. But contemporary with Crecy was an even greater event,—

the Black Death, that terrible visitation of all Europe by cholera originating perhaps years before in China. In England it affected villages, towns and country alike. It came in 1348, sometimes depopulating the country so that perhaps not one person in ten was left. The Black Death draws through the history of Europe a wide black line. Nothing was the same afterwards as it had been before. In all Europe it divides the Middle Ages like a watershed. So few tenants were left to cultivate the soil that the feudal dues were entirely neglected and cultivators were sought in all directions at any price. Prices began that rise which in the Eighteenth Century was to become twelvefold. Money leases gradually became common and the position or the cultivators of the soil was correspondingly improved. Almost as third element in the change, although it was perhaps as much a result as a cause, was the rise of Lollardry, the new gospel brought by Wyclif, whose preachers and translations of the Bible were so unacceptable to the prieits and friars, who made up one in fifty of the population. With all this came social and civil disturbances, which need not be detailed.

The Wars of the Roses, even broken by such brilliance as the reign of Henry V, is a dreary period in English history until one studies the social changes, particularly in land tenure and cultivation, developed by the study of such men as Thorold Rogers into the manor rolls and bailiffs accounts. These have attracted little attention until lately, but show how the cultivation of land changed from that by the lord through his bailiff to that of the tenant farmers at a fixed rent. At first we find the lease to be of land and stock, including cattle and implements, and farming was almost on shares, as it was to be in America after another great social upheaval. Gradually it changed however to pure money rents and the relation of landlord and tenant became established much as it has ever since remained. With it came another change, not strictly agricultural. England from the earliest time has produced the best wool in Europe; for that of Spain is valuable only for certain qualities. One of the important uses of land, therefore, came to

be for raising of sheep and for the industries which are connected with it. For this purpose wide fields are needed and the process began which is called enclosure, by which the old cultivation in common with scattered furrows belonging to different farmers, was abandoned. On the one side was the enclosure of fields for sheep raising; on the other a growing tendency towards having a smaller farm for one's self and towards English individualism. Both worked against the old rule of common culture and commons of all kinds. The golden age of the country laborer was the fifteenth and sixteenth centuries, when the towns were small and, did not contain over one twelfth of the population, England was an exporter of agricultural products and so remained until the Eighteenth Century.

The commercial tendency, brought a constant struggle between entailment on the one side and the desire for alienation on the other. Lawyers became more and more active and exercised their ingenuity in both directions. Conveyance by writing was always in use, but there was lack of publicity, and even the old livery of sasin, theoretically in the presence of the vicinage, encouraged secret transfers, where these were possible at all. One of the most marked remedies to break up an entailment was what was called a recovery, that is, a fictious suit to which the life tenant and remainderman were parties, and in which the wife joined to bar her dower by a memorandum at the end,—hence called a **fine**. This became common from the time of Taltarum's case and indeed it gave rise to the fictions afterwards so common in the action of ejectment.

Of conveyances proper the procedure by which one leased his land in public and then made a private release of the reversion to the lessee became the favorite. Of a similar character, and having the advantage also of secrecy, was where one bargained to sell land and afterwards completed the sale. Possibly even more frequent were conveyances in trust, enforced from the time of the Edwards by the chancery court acting upon the conscience and if necessary upon the person of the grantor. These had the great advantage of being absolute conveyances and yet not

offending any law against alienation, for the title would still remain in the grantor. Of course all forms of conveyance take for granted that there is something which can be conveyed, but this under the commercial evolution gradually became common. A landmark was the rule in Shelley's case, highly technical but advantageous to conveyance. This as reported in 1 Coke, 104, is that where a man takes land which is limited to his heirs after an intermediate interest, the estate is practically in fee, that is, the addition of the word "heirs" does not mean that it goes to heir unless the owner so leaves it.

The whole tendency of English legal development, therefore, especially from the time of the Tudors, was towards the alienability of land. This was aided by the legislation of Henry VIII, as when he dissolved the monasteries and practically threw a third of England upon the market. The greatest step was the Statute of Uses in his 32nd year, designed to abolish secret alienations in trust and to vest in the beneficial owner the title held for him by trustees. On the other hand the statute led to the modern forms of conveyances.

The previous tendency to alienation was now reinforced by a tendency towards publicity of alienation; for it is as much to the interest of the community to know what conveyances have been made of land as to have the power to make conveyances at all. This was aided by the Statute of Frauds in the time of Charles II and also by that of Wills. These provided that conveyances of land should be in writing and duly witnessed. Record of such papers was another matter and was only known to local customs like that of London. It was to be long before the delivery of muniments of title, perhaps preserved in old oaken chests, was to give way to the record of conveyances in books accessible to the public.

Quite as important as having a right is having a remedy to enforce it, as we have seen in other connections. Indeed the discussion of the right of property has revealed a number of these remedies, beginning with the writs of right of Henry II. The rights of landlord and tenant were

at first adjusted in manor court, but even these came finally before the royal courts like other land matters. Ejectment with its favorite jury procedure superseded the antiquated writs with their appeal to God. It is true that the remedy of ejectment, originating under Edward III, by its terms concerned only the possession of land, and frequently ownership was what really needed adjudication; but by the "consent rule" invented by Chief Justice Rolle under the Commonwealth, by which the defendant must admit a fictitious lease, entry and ouster before he was admitted to defend, the only question left for trial was that of title. Hence ejectment, triable by jury, became the best if not the only method of trying title to land; and it so remains to this day in some jurisdictions.

From the beginning, therefore, land questions were of extreme importance. Agriculture and sheep-raising were the chief industries and both pre-supposed the use of realty. Experience had proved that the use was best when it was accompanied by full ownership, and so, despite the efforts of the feudal nobility, the popular struggle from an early period was for freedom of alienation; and this was gradually secured by the Common Law as evolved by the courts and also by statutes from time to time. The evolution was a long one and thoroughly English in being practical and covering only one step at a time. The day was to come when the population outgrew country and cities alike, and this was to bring about on the one hand colonization to foreign continents and on the other the mastery of the seas and of the world's commerce; but the history of real property in England still remains one of the most important and most interesting chapters of the Common Law.

VIII

EQUITY

Aequitas dicitur quasi aequalitas.—Bracton.

Authorities: C. C. Langdell, Summary of Equity Pleading. Joseph Story, Equity Jurisprudence. J. N. Pomeroy, Equity Jurisprudence. Geo. Spence, Equitable Jurisdiction of the Court of Chancery. White and Tudor, Leading Cases in Equity. F. Pollock, Transformation of Equity. F. W. Maitland, Canon Law in the Church of England.

The royal courts had extended their jurisdiction by means of the action known as trespass, and were gradually refining its principles so as to include all forms of contract as well. But their construction even then of the old statute of **Consimili Casu** was so strict as to confine them to cases of money judgment alone. There were some special writs, such as mandamus and prohibition, but these were so unusual as to create no well defined jurisdiction. There remained, and they remained outside common law jurisdiction, all questions involving the duty of doing something. Damages could be recovered, whether in tort or contract, for not doing something, but the Common Law courts expressly refrained from all questions of duty. This partly grew out of the origin of their jurisdiction in trespass and was also due to the necessity of framing a single issue to be tried by a jury.

Nevertheless, such questions arose. It was possible even in the time of the Wars of the Roses for a man to injure another by not doing something and inflict injuries for which money compensation was inadequate; Specific Performance did not stand alone. Indeed even earlier came the frequent case in those days of a man holding title to land for the benefit of the church, particularly after uses became unpopular. The War of the Roses themselves brought the common case of family settlements to avoid forfeiture for treason, inasmuch as when the crown changed from the red to the white rose, or from the white rose to the red, there followed wholesale confiscations.

Fortunately there was a tribunal adequate to the task and ready for the work. The king being the fountain of justice, and only certain kinds of justice being dispensed by his ordinary courts, application was made to him perhaps from the time of Edward I, certainly shortly afterwards, for exercise of his residuary powers of doing justice. Such applications were in the form of petitions and naturally came through his clerk, otherwise known as the chancellor, from the lattice which shut off the bishop's secretary.

It was equally natural that the king, who was not a lawyer in any sense of the word, should more and more rely upon the judgment of his chancellor in such matters. The chancellor was always an ecclesiastic, generally a bishop, and therefore versed in the Canon Law, and frequently also in the expanding system of the Civil Law, from which the other took its origin. Not only so, but the chancellor as secretary was the royal official who issued all the writs to the courts, upon which their jurisdiction was founded. Legal supply and demand therefore met each other in the chancellor's office.

Here, as at Common Law, we find the origin of law in procedure, for Equity is in its form nothing but a supplement to the deficient procedure of the Common Law. From the beginning it did not pretend to do other than supplement the ordinary courts. The basis of the application always was that the petitioner had no remedy at common law, and this phraseology is preserved until the present day. Not that the common law courts saw this growing jurisdiction with equanimity. To conciliate them the chancellors did not assume to hold any court. They issued none of the writs which they kept in stock, and no complaints were filed before them. The applicant wrote a petition, perhaps the more verbose because it was informal, setting out that he was injured by the fraud, mistake or confidence he had misplaced in a certain other man, and thereupon if the chancellor thought the petition had merit he directed a notice to the respondent, directing him under a fine, **subpoena**, of one hunded pounds, to appear before him on a certain date and make answer, generally under oath if the petition was under oath. The first cases seem to have related to force or oppression by great lords over small land owners, the more proper for the king's interference because the king was himself overlord. Soon, however, the question of holding lands to the use of the church gave a wide and definite field for the chancellor's activity.

As far back as the time of Bracton it was said that equity is equality. Indeed, this idea in other words is found in the Corpus Juris coming down from Justinian.

The idea that a man must do his duty, must hold land for the benefit of the person whom he had agreed to protect especially if this was the church, as it generally was at first, was one familiar to the canon lawyers, and appealing strongly to the clergy. The keeper of the king's conscience, as the chancellor was called, was the best man to whom to address an appeal that a private subject should do what was called for by good conscience. The usual expression at first was to perform what was "in good conscience," and it was only later, about the time of the Reformation, that the expression Equity superseded this as a ground of interposition. Equity and good conscience long remained practically synonymous and bear writness to the origin of the chancellor's jurisdiction in the Canon Law, whose procedure practically passed over the new court.

Henry VIII among his other reforms attempted to abolish the promiscuous use of the device known as Uses. He accordingly had a statute passed to that effect. The result, however was, as never happens with custom but frequently happens with statutes, different from what was intended. All that was actually abolished was passive uses; active uses were not affected in any way. The statute vested the title in the beneficiary only where no duties were imposed upon the trustee. No less an authority than Lord Hardwicke, the greatest of all chancellors, was later to declare (in Hopkins vs. Hopkins, 1 Atkyns 591,) that the only effect of the statute was to add three words,—"to use of"—to a conveyance. James Barr Ames has shown this to be incorrect, but nevertheless Trusts became the principal head of equity jurisprudence and so remain until the present day. Maitland declares that Equity has added to Englsh law one great institution, that is the Trust, and three important remedies in Specific Performance, Injunction, and Administration. This still remains true, although administration in the English sense of management of family estates by entail or otherwise is not known in America. In America administration, however, is perhaps even more important in the receiverships, now so common, of railroads and other corporations and in Bankruptcy, which is a branch of Equity

procedure, organized separately. One of the most useful functions of the Chancery Court, beginning in England, was securing to a married woman her separate property, from whatever source derived. This was a large part of the jurisdiction of Equity, and has been adopted by legislation, like examination of parties, depositions, and other rules originated by the chancellors.

It is not to be supposed that equity jurisprudence reached fullfilment at one bound. It grew in such a way that the law courts could not complain of the administration by ecclesiastical chancellors, but the situation was somewhat changed when under Henry VIII himself lawyers versed in the Common Law, like Sir Thomas More, came to the woolsack. In the time of James I Lord Ellesmere enjoined plaintiffs in Common Law suits from pursuing their legal remedies. To this Lord Coke, then Chief Justice, strenuously objected, and indeed never did recognize the validity of such an injunction, although it was directed to a party and not to the court itself. The controversy became so acute as to call for the interposition of the king, who was nothing loth. He heard the Chancellor and the Chief Justice himself and by the advice of Lord Bacon decided in favor of the Chancellor. And from that day until this injunctions have issued against parties in common law suits forbidding them to go further under pain of contempt of the chancery court.

The chancery court had its ups and downs even later; for it was abolished by the Commonwealth, but it was put on a permanent and broad footing in the time of Charles II by Lord Nottinglam, affectionately called the "Father of Equity". From his time the dozen Maxims on which Equity rest have been fully worked out. To him succeeded great chancellors, among whom one best remembered was Lord Eldon, who could declare that equity was based upon principles as well defined as those of the common law. However this may be, its principles and procdure were expansive and have kept up with the progress of modern civilization. Perhaps we may make more definite the expression of that great teacher C. C. Langdell and

define Equity as the science of enforceable duties, over against Common Law as the science of money damages. Equity has ceased to be purely in **personam**, but from that origin it has retained much of its **status** quality. And the growth of jurisdiction is still, despite changes of form, in Courts of Equity and not in Jury tribunals.

IX

SHAKESPEARE'S FAMILY

Such duty as the subject owes to the prince,
Even such a womon oweth to her husband
—Taming of the Shrew.

Authorities: Wm. Shakespeare, Plays. Life by Rowe and others. Sir Edward Coke, Institutes; Reports. R. Caillemer, the Executor in England. **Corpus Juris Canonici,** (various editions.) **Codex Juris Canonici,** 1917. W. S. Holdsworth, Influence of Coke on the Development of English Law. Lindo vs. Belisario, 1 Hagg. Cons. 216 (Stowell.)

Among the most interesting books of any library is that which borrows Mrs. Hemans' phrase and is called The Stately Homes of England. In its text and illustrations one sees the country houses surrounded by grounds and trees which make so attractive the English landscape. And yet by the time of Shakespeare not only had the castle given way to manor, but it is in cottages of the middle class, such as that in Henley Street, Stratford on Avon, with oaken frame filled in with clay or brick, low ceiling and narrow stairways, that we must look for the true basis of the Anglo-Saxon race. Downstair opening into the street Shakespeare's father carried on the woollen or similar trade, and the family lived upstairs, where there were fireplaces just as below. Outside was the garden for flowers and vegetables, only now becoming familiar from their introduction by immigrant Hollanders. Lord Bacon could declare that it was God himself who planted the first garden. It was within, however, that we find the English family life; for a cold climate forces people closer together than nearer the equator, and it is the fireside which has originated much that is characteristic of Anglo-Saxon civilization.

Such were the homes, scattered mainly in villages over the island, for the twenty odd towns were small. Even London with all its power and customs had but 150,000 people. The Thames still ran clear and furnished salmon for eating. On the northern bank were the palaces and gardens of the nobility, whom a strong government was attracting to court life, and across the river at Bankside were beginning the first theatres, where the plays of Marlowe and Shakespeare, the moving pictures of that day, were commencing to educate the common people and complement the Scriptural learning of the cathedral windows. But the English were always a serious folk. Religion had controlled them from the introduction of Christianity in Anglo-Saxon times. Wyclif had lately taught them the use of the Bible in the vernacular, and the different versions were now since Henry VIII's Reformation becoming the basis

of both public and private life. Much of what we nowadays endeavor to trace back to Germanic or Roman sources really comes from the English Bible, which indeed until even a century or two ago was the principal book of the Anglo-Saxon races. The old English homes nevertheless remind one much of the old Roman homes, for the different religions, earnestly believed and practiced in both, brought the same results in daily life. The Roman never left in the morning without a sacrifice to the Lares and Penates, who were supposed to watch over him and his family all the day; while the English father would hold family prayers and also go out to his work relying on the guidance of God. And the earnestness of the two peoples produced results which were much the same whether upon the Thames or upon the Tiber.

The greatest of the forms of **Status** is the Family, and the Family, or domestic relations, may be looked at from several points of view. Thus, we may consider the husband and wife, parent and child, in personal and property relations during their lives. Then we may consider the results of death in the devolution of property, and with these naturally come up questions of intestacy and testaments. Guardian and ward on the one hand and master and servant on the other are collateral matters necessary for a full view of the subject.

The relation of husband and wife is fundamental in all civilizations. It was regarded in early Rome, as in the present Catholic church, like a sacrament, but at Common Law it is strictly a contract between husband and wife, in which the state also has an interest. Under the Commonwealth it was treated as a civil contract, to be performed before justices of the peace, but before and since that time the public interests have been more thought of. The Council of Trent declared that it must be solemnized before a priest of the church, but the Council of Trent and its decrees have no force in England. The statute of 32 Henry VIII recognized that a witnessed agreement made a valid Common Law marriage, for it is a good marriage that is according to "Goddis Law." Nevertheless, the natural re-

ligious character of the people was such that a marriage not before a clergyman was the exception, although there was a long struggle to validate marriages before pastors of dissenting churches. Within the memory of men now living the House of Lords in the case of Regina vs. Millis was to declare that the presence of a clergyman is essential; but that is one instance at least in which the declaration of the highest court is recognized to be wrong and cannot be said to have become part of the Common Law. Stowell's decision in the Dalrymple case was the true one. A male of fourteen and a female of twelve years of age were at Common Law competent to contract matrimony, with, however, the consent of parents. Statute has modified this rule.

The control of the father over the family was almost absolute, although it was not expressed in such legal terms as that of the **paterfamilias** of Rome. Theoretically the courts could interfere to protect any one that was wronged, whether wife or child, but as the courts held the same notions as the laity interference was a gradual evolution. It is universally conceded that the father could impose corporal punishment upon the child, and it is sometimes claimed the Common Law was that the husband could control the wife in the same manner. This has been denied in Regina vs. Jackson, however. It is said that wife-beating has always been a practice among lower classes, but it is of Siberia and not England the story is told that the wife regards the non-use of the whip by her husband as a mark of declining affection. Bryce hinks that the husband's power and control amount to a combination of absorption, guardianship and partnership. In the time of Shakespeare such duty as the subject owes to the prince, "Even such a woman owevth to her husband." Hence it is commonly said that at Common Law the husband and wife are one, and that one is the husband; but it is to be recollected that in England just as at Rome the practice was different from the theory. There has been a gradual advance from Mastery towards Equality. The practical ownership by the **paterfamilias** gradually evolved into a trusteeship for the benefit of the wife and children, and so it was in England, except of

course as happens always in particular cases.

Marriage was practically a gift to the husband of all the property of the wife. This was absolutely so as to her personal property, and practically so to her real property, because, although she must join in a conveyance, there was at first no means of ascertainng whether that joinder was voluntary. This, however, was secured by action of the courts, where in the procednre known as a recovery the wife mnst be examined separate and apart and this noted that the end. In exchange there arose in Norman times the right of the wife to dower for life in one third the hnsband's real property, and also an interest in the personal property which he might leave at death. One of the ways of avoiding the control of property by the hnsband was an antennptial settlement by deed to trnstees, and this became the nsual mode of procedure. It was encouraged by the rising power of the Conrt of chancery, one of whose greatest fnnctions was the protection of the estates of married women. This was a branch of the law of trusts, bnt, as it affected such a fundamental institution as marriage, made np one of the principal divisions of equity jnrisdiction.

The other side of marriage is divorce, and this was not a civil function in any sense of the word. The church was the connecting link between ancient and modern times, and its Canon Law was the means by which much that was good of Roman Law and civilization has been translated to modern times. No doubt its administraton was inflnenced by ecclesiastical tradition and ecclesiastical interest. No doubt its procedure of searching the conscience by an inquisition which racked the body was liable to great abnse. Nevertheless, its aim was lofty and the Catholic opposition to divorce had a restraining and beneficial effect upon society. Perhaps the rich could obtain dispensations, bnt the rich did not make up the majority of the popnlation. The church conrts granted two kinds of divorce. The first was called **a vinculo matrimonii** and was snpposed to be for impediments invalidating the marriage from the beginning. This logically made the children illegi-

timate, but means were found, for a consideration, to obviate this result. The other form was more usual and was called **a mensa et thoro**, from board and bed. This amounted to a legal separation and not to a divorce in the modern sense of the word. The legislation, not say practice, of Henry VIII somewhat changed the subject of marriage and divorce, but in principle the jurisdiction of the ecclesiastical courts, now become Protestant, remained much the same. The readiest way of obtaining a divorce was by act of Parliament, as was sarcastically explained by Justice Maule to an humble offender, and it was not until within recent times, 1857, that a divorce court was created in England.

The father's control over the child was if anything more complete than over the wife, but the child was recognized as having property of his own, although under the control and guardianship of the father. Three separate stages of growth were recognized at Common Law. Up to seven years of age the child was not responsible in any respect. Between seven and fourteen years of age the case was more doubful and would depend upon the physical and mental advance of the person in question. He could, for instance, ordinarily be a witness. At fourteen he could nominate his own guardian, but he was called an infant until he was twenty-one, when he legally came of age. Before twenty-one he could make no contract that was binding upon him except for necessaries; that is to say, any contract he made, except for his support and maintenance, could be renounced and invalidated when he came of age, and that without returning the consideration which may have been paid. So much for legitimate children. On the other hand those born out of wedlock were called bastards and were **filii nullius**, with claim upon their mother, but not upon the supposed father.

After the father's death came the question of guardianship. He could appoint a guardian by will or in a proper case the courts would appoint one. So far as the guardian had to do with property he stood in the nature of a trustee. Theoretically he succeeded to the rights of the father in handling the poperty, but must give an account when the

ward reached maturity. His control of the person of the child was much more limited, for here the rights of the mother and of the child himself after fourteen were recognized.

Now-a-days we should hardly consider the subject of Master and Servant a part of domestic relations. The Industrial Revolution at the end of the Eighteenth Century was to introduce factory conditions and make a great change in family as well as in personal relations; but in the time of Shakespeare servants were practically a part of the family. Many a man of the middle class had in his household servants under an indenture by which he contracted for a certain length of time to feed and clothe them while he taught them a trade in exchange for their service, and Shakespeare no doubt had several at home and the other house which he owned. There was little difference between these servants, who were free, and the children,—for instance, the eight children making up the family in which William was brought up. The wool business was carried on in many homes by the family and by such servants. The word "master" was commonly used as a term of address, and was gradually to fade into the "mister" so characteristically English, while under the new conditions of the colonies it was to mean owner of slaves. Already Falstaff was to say of Bardolph that he bought him at St. Paul's. Thus it is that Master and Servant became so important a title at Common Law and the rule of responsibility of the master for the srvant's acts has become incorporated in the maxim **respondeat superior**.

So much for domestic relations during the lifetime of the father and mother. Finally, in all cases, death would intervene, and as Shakespeare has it, "He that dies pays all debts." The church courts took charge of the distribution of the estate, both because it generally involved gifts to the church and for the good of the soul of the dead man. In the time of Glanville the rule prevailed in England as on the continent that an estate consisted of three equal parts, of which the heir received one, the widow another, and the rest was at the disposition of the owner. Wills we

have found from Saxon times, but they were long the privilege of the rich. Not that executors were ever unknown. They are found in the Canon Law, and Caillemer has shown that they were used upon the continent before the Normans settled in France. Such an executor might be appointed by a man during his lifetime without making a will at all. When wills became common executors carried out their provisions, which were at first confined to the disposable third,—what was called the "dead's part." The heir in England and on the continent had to pay the debts of the decedent and make up any deficiency from his own pocket. And this remained true of the executor, who took the place of the heir, and, as Holmes has shown, was the real owner of the property. How far these rules came to England from France, and in particular from Gascony through the sovereignty of the English kings over Anjou and Guienne, is an interesting question. Caillemer gives reasons to think that this was the channel through which Civil Law influences came rather than through the Normans. The power of disposition, however, in England gradually extended to the whole estate.

By Shakespeare's time wills were well known, although he calls them by the Civil Law name of testaments, as when he mentions the "purple testament of bleeding war." It was in his day that the English Bible made the word common even of the will of God, that is to say, the Old and New Testaments. Shakespeare made a will himself, and his aunt had been an executor of his maternal grandfather long before. Indeed, Shakespeare not only knew the law of domestic relations, but is almost as full of the Common Law in all its branches as was Lord Coke, his younger contemporary; although of chancery and ecclesiastical courts he has little to say. The King's Courts were by this time supreme. The Manor Courts like the yeoman's long bow were falling into the sere and yellow leaf of disuse. The printing press had become famous in Venice and was commencing its work in England. The age of Elizabeth was the beginning of modern Anglo-Saxon civilization, in law well as in commerce and literature.

X

THE INNS OF COURT

Those bricky towers
The which on Themmes brode aged back doe ride
Where now the studious lawyers have their bowers
—Edmund Spenser.

Authorities: J. F. Dillon, Laws and Jurisprudence of England and America. Modern Reports 9. W. B. Odgers, History of the Four Inns of Court. J. C. Jeaffreson, A Book about Lawyers.

It may be a question whether London was the political capital of Britain under the Romans, but it certainly has always since that time been the principal city. The origin was doubtless the fort which afterwards became the Tower of London, making up a part of the east boundary of the city where it joined the River Thames. The city itself within the walls might be said to be strung out on two streets roughly running parallel with the river. The one along the river bank was called appropriately the Strand, but changing its name in true English fashion every few blocks. The other came from the country about Oxford and ran eastward to the coast. A Spanish city would have centered about a church and plaza; the English were less religious or more practical. London was roughly an oval, having two foci, religious and civil. Between the streets just mentioned the western focus was a church, St. Pauls, the eastern was a trade centre, grouped about the Mansion House of the Lord Mayor, to which were added in time the Royal Exchange and the Bank of England.

From the time of Magna Charta the courts as well as the royal residence were at Westminster, further up the river. As we see even in country county seats today, lawyers and law offices naturally group themselves about the court house. The beginning of law schools we do not know, except that Vacarius taught the civil law at Oxford in the time of Stephen. Lawyers and law students must have existed in London at an early date, for we find Henry III forbidding the students of law to live in the city from the year 1235. The lawyers seem to have concentrated themselves thereafter in the western suburbs of London, outside the walls, in the direction of Westminter.

Here it is that we find the great legal institutions called Inns of Court, societies where the ruling branch were named benchers, having the duty of teaching students, who lived in the same building, and even took their meals under the oversight of the society. In true English fashion all

this was an evolution. No one knows when or how these societies actually began. The first trace we have of them is when they were occupying rooms in the town residences of different nobles, and ultimately they came to own these as their own homes. The clearest light is thrown upon them by Sir John Fortescue, who about the year 1470 describes them, writing from his banishment in France. This, however, is an advantage for our purposes, because he was there familiar with the life of the great law schools of Orleans and Paris and compares these civil law centres with the very different common law schools of England.

Perhaps not the earliest but among the most striking of these Inns of Court were those in the Temple. The Temple was the cloistered residence of the Templars on the bank of the Thames, partly within and partly without the western wall of London. So large it was that it was divided into several parts, and this originated the two Inns of Court known as the Inner Temple and Middle Temple; for in some way when the zeal of the Crusades subsided and the Templars became of less importance the growing societies of lawyers and students rented and then bought the old Temple buildings. Indeed the evolution has gone on and at times when the lawyers did not need all the chambers of these different courts they were rented out to others, and some parts of the Inns of Court have become literary shrines. The societies of the Inner and Middle Temple can be traced back to the time of Edward III, and Chaucer was one of the inhabitants. In much later days Lamb and Fielding lived there, as well as Goldsmith, whose tomb is in the beautiful Inner Temple church. Philip Yorke, who became the great chancellor Lord Hardwicke, studied to good purpose at the Inner Temple. Perhaps older yet was Lincoln's Inn, which besides its legal features recalls rare old Ben Jonson, who helped build part of its walls, and long afterwards Lord Mansfield we associate with the Temple Gray's Inn further out completes the list of four great Inns, and is associated both from a legal and literary point of view with Lord Bacon, who lived there, and indeed there it was that he met his death in experiment-

ing to see how far meat could be preserved by snow. At Gray's Inn, and indeed at all of them, were performed famous masques, those delightful plays of fantasy of which we have reminiscences in Comus and Midsummer Night's Dream. Some of the plays of Shakespeare were first performed there before Queen Elizabeth.

The common law Inns of Court were supplemented by smaller Chancery Inns, ten in number, each in the time of Fortescue having more than a hundred students. Some of these belonged to the great Inns of Court,—Clifford's, for instance, being owned by the Temple. Despite their number and the growing importance of the Chancery Court, these were not to prove as lasting as the common law Inns, and in our own day have largely disappeared.

So much for the location and buildings; what was the nature of the studies pursued? In this Fortescue helps us, and we have other light in the time of the Tudors. There was no study of the theory of law or of its principles. The division of law into Persons and Property, with subdivisions, was foreign to the English mind. The first branch of study, and indeed the most fundamental part, was that of the writs in chancery. This illustrates at once the practical character of the English mind and the principle insisted upon by Maine that law is secreted by procedure. The beginning of a law case was the writ issued by the chancellor to the court to render justice to a plaintiff alleging such and such things to have been done by the defendant. Upon this defendant was brought into court, pleadings instituted which developed the issue, whereupon came the trial with its questions of evidence to be decided by the judge, the verdict of the jury and the judgment of the court. Everything depended upon the original writ, and it was to this that the English law students gave their first and best attention. It was in this connection that was written one of the most famous of law books, the **Natura Brevium** of Fitzherbert.

The second branch of teaching, for it was hardly a second branch of study, was made up of readings by the benchers to the students. When it is recalled that "read-

ing'' is simply the English word for ''lecture'' it will be seen that the method of teaching was much the same as at present. It was in this way that some of the best known books in English law came to be compiled, for without the Inns of Court we can hardly think of Sugden on Vendors, Chitty on Pleading, and similar works, although their shape when adapted for public use was somewhat different. The most famous of all law books perhaps have been Blackstone's Commentaries on the Laws of England originally lectures delivered at Oxford in 1765 upon a foundation left by Viner. It is true they were not readings in the Inns of Court, and probably were of too literary a character to have been appreciated in those technical centres; nevertheless the plan of law lectures came from the Inns of Court and was only tardily taken up by the universities. In point of fact, the universities have had little to do with the practical side of law, and this has been developed almost exclusively by the Inns of Court.

A third subject of instruction at the Inns was connected with the revels,—a subject which would be tabooed in any modern course of law study. But the time when the Inns originated called for instruction in manners. The lawyers formed a class apart, neither noble nor common, but partaking of both; for the judges were selected from the bar and became part of the nobility. It was very important that the student should know how to dress and behave and this applied in early days to the table. So that we find in this way instruction in manners and to this end were introduced the masques of such men as Jonson and the plays of Shakespeare. This side of student life could be abused and was abused. It was the reason that the Puritans opposed the whole system of the Inns of Court. Fortunately the bar had the good sense to recognize the source of the trouble and remedy it.

Perhaps the most practical part of the instruction was in the moot courts. These were not instructions in oratory or contests in eloquence. They were for the argument, often dull and prosy, of ponts of law; but we know from Bacon himself that if writing makes an exact man speaking

makes a ready one.

A privilege of the Inns rather than a method of teaching was their right to call lawyers to the bar. This was granted them at an early date and has been preserved until the present. The first English lawyers seem to have been called **Servientes**, Anglicized as Serjeants, which afterwards became a title of the higher rank of lawyers, carrying with it the black gown. This survived from the time when lawyers were clergymen also, and a black cap or coif,—said to have been used in order to cover the tonsure when it became unlawful for the clergy to practice in the common law courts. Later came the more practical division between the attorneys, who were not lawyers at all but prepared cases for lawyers, and the barristers who practiced at the bar of the courts. In admiralty they bore the name of practors protectors, and in chancery were called solicitors.

The Inns of Court had their periods of prosperity and decline, but in our own day have entered upon a new and more active life. It is to them that is due the great system of law reporting which has superseded the old individual reporters once so familiar, and their choice of a home has been justified by time. When Westminster Hall became too small for the business of the kingdom and new Courts of Justice were to be built, the government turned naturally to Chancery Lane, leadng from the Strand up to Oxford Street and beyond, where for so many centuries had flourished the Inns of Court. There were erected the great buildings which house the upper English courts. The Inns of Court had given this district in the west suburbs of the city the legal atmosphere, and there was to be for all time the centre of English law.

XI

GREAT STATUTES

By dint of patience and by watching for opportunities, the English people has developed a system, which, though far from perfect, has achieved much of that which had long been the Utopia of philosophers.—Thorold Rogers.

Authorities: Statutes of the Realm. Historical Survey, by the Record Commissioners.

Since the time of Montesquieu the principle has been universally accepted that government is divided into the three departments known as legislative, executive and judicial; but society has not always had separate organs for these different functions, nor are separate organs essential. As the Roman Jurisconsult asks, what difference does it make how a law originates provided the people accept it as law? This is not only common sense, but it is history. Since the time of the Byzantine emperors, legislation had been supposed to be a royal function until the rise of the Parliaments. The laws of Edward I, far reaching in every way, were really royal edicts, consented to by a council of nobles, but without the formal sanction of the Commons,—who did not yet exist. Indeed, the same was practically true in the time of the Tudors, when there was a parliament, but a parlament subservient to the will of the king. Great statutes were passed under all these circumstances, and judicial legislation also, of the most important character, originated even then with the courts, and under the name of construction or interpretation is still in force under formal constitutions. Statutes are frequently only a declaration of what law is already in practice, and always unless it represents public opinion a statute is law only in name.

For this reason it is not important to us to study the method by which laws have been passed. The important point is what the law is; not how it originates. And in this way we shall find not only great statutes under Edward I and Edward III, which we have already studied, but others in the times and bearing the names of later monarchs. Statutes are the expression of the will of the people to meet the needs of the day. Sometimes they are temporary, sometimes they are lasting. The latter are the only kind which interest us at present.

Important for its collateral effects was the Act of Supremacy, passed 1534, in the time of Henry VIII; for it not only separated England from the Catholic Church, but

it constituted a change of front, a change of base of all laws affecting morality and domestic relations. The ecclesiastical courts still remained and exercised much the same jurisdiction over marriage and divorce and family matters; but Roman Canon Law as such ceased to be binding and an English Canon Law grew up, looking more and more towards Common Law principles, although the probate courts always remained separate. The work of the ecclesistical courts gave us the present rules of marriage, divorce, domestic relations, dower, inheritance and the like; it preserved the connection with the past and represented the side of civilization concerned with **status**, while so much else was looking to the new field of contract.

The time of Henry VIII was fruitful in many ways. We have already seen how the Statute of Uses of 1535 was designed to break up not only the **mortmain** which had vested so much propertly in the church, and now made unnecessary by Henry's seizure of the monasteries, but was designed also to simplify land tenure by making the real ownership coincide wth the legal title. This was indeed to simplify conveyances in a way not contemplated by the law. Up to that time deeds had not been necessary to convey land, for the primitive ceremony known as livery of seizin, that is, the delivery of a clod of earth and a twig of a tree, was the symbolic act of sale. Leases, however had become so common that an ingenious lawyer added to the formal lease of land to a tenant a clause which released to him the remainder of the ownership. In this way a deed of lease and release passed the absolute title. Another form of conveyance was that of an agreement to sell accompanied by delivery of possession in much the same manner, and known as bargain and sale. These two forms of conveyance came to be the principal ones employed in England, lasting even to the present day for the transfer of real property. Like everything in England, however, this was all a gradual evolution, and it was brought to perfection through the ingenuity of lawyers long after the Statute of Uses itself. Wills had never been unknown even from Saxon times, but under feudal principles there was

little land which could be willed. That belonging to tenants of the Manor, which made up the bulk of English estates, passed by the custom of the Manor and was registered upon the Manor books. Estates of the nobility were governed by the terms of the original royal grant, and the property of the growing merchant class was largely arranged by formal settlements. The will was to receive distinct extension in the time of Charles II, but the act of 1540 was the basis of subsequent legislation.

The policy of preventing frauds against creditors was strengthened if not originated under Elizabeth, when the statute against frauds was passed in 1570, of much use in chancery even down to the present. England's sea power had begun. It was under James I, however, that the growth of England as a commercial power was clearly reflected in her legislation. In 1603, amended twenty years later, was the first real law on the subject of Bankruptcy; for it had now come to be realized that it is even more important for the state to have a good citizen than that a creditor collect his debts. Imprisonment for debt was to prevail for a long time afterward,—as we see even in Dickens' novels, —but at least the legislation of James enabled a debtor to turn over his property and then himself begin business life anew. Along the same line was the Satute of Limitations of 1623, under the same monarch. It differed from the Roman rule as to prescription in that it did not extinguish the debt itself. There was no practical difference, however, inasmuch as when you take away the remedy you practically abolish the claim itself; and in modern times the title really passes also under the statute.

The age of Charles I and the Commonwealth was political rather than civil. Under Charles the Petition of Right in 1627 was to become the basis of all future political progress. Its principles were put in practice under the Commonwealth, and there followed much judicious legislation. This, however, was later to be considered as occurring during the "absence" of the king, and without force,—although practically its most important features were re-enacted under Charles II. Thus in the year of the

Restoration the great Navigation Act of Cromwell, by which English goods must be carried in English bottoms, was continued as law, and this was to prove the basis of English maritime supremacy. The same year, also called the twelfth of Charles II on account of his "absence" previously, was the act abolishing military tenures and in effect substituting for them what was known as free and common socage or tenancy in fee simple. The Commonwealth had ended Feudalism and this act acknowledged the **fait accompli**.

Of even greater importance was the Statute of 1677 entitled "An Act for the prevention of frauds and perjuries," which has been the basis of Anglo-American progress in many ways. Kent calls it the most important of all laws affecting private rights. It covered many heads but of special importance were those relating to transfer of real property and those relating to certain contracts up to that time made orally. All of these transactions must for the the future be only in writing. In this way were covered conveyances, leases for longer than one year, trusts, promise by executors to answer out of their own estate, agreements upon marriage, contracts for the sale of realty, contracts not to be performed within one year, and the sale of goods exceeding £10 sterling. All such matters must be put in writing and signed by the party to be charged, unless indeed the contract was already executed at the time by delivery of a part or payment of earnest money. The statute was apparently planned by Sir Matthew Hale and drawn by Lord Nottingham. It is almost impossible to think of modern business affairs except in its terms; and yet it does not prevail even to the present in Civil Law countries.

Other legislation followed, but it was largely political. Thus two years later came the famous Habeas Corpus Act, not indeed originating the right,—for that had long existed; but defining and simplifiying the procedure in the form in which it has ever since continued. Ten years later under William and Mary came the Bill of Rights which declared the rights of Englishmen and is second only to the Magna Charta in importance; but legislation on

subjects of private law is less prominent. Indeed, the age of great statutes had now almost passed, for it is not until Fox's Libel Act of 1792, leaving the law as well as the facts to the jury, that we have another.

During the Nineteenth Century came a vast mass of legislation, when, as it has been satirically said, law books were enacted into statutes. Under Victoria almost all subjects have been revised and re-enacted, practically codes without that name. Among the greatest of these was the one combining the three great courts of King's Bench, Common Pleas, and Exchequer into the High Court, itself in divisions taking care of the old branches of jurisdiction. This dates from 1873 and 1875, and can hardly be considered in our present view of legislation.

To the American only those statutes enacted before the settlement of the colonies were to be considered as part of the Common Law brought from England. And in one point of view a statute, which necessarily changes the course of the Common Law as developed by the courts, is not strictly common but statutory law; on the other hand Chief Justice Wilmot declared the Common Law to be only worn out statutes. Here is seen one of the peculiarities of Anglo-American legal development. The legislature and judicial departments are theoretically separate, and the fundamental constitution so declares. In point of fact we do not know the meaning of a law, never so plain, until declared by courts. A constitution itself is subject to the same rule. The Slaughter House cases were to make of the epochal Fourteenth Amendment a very different thing from what Stevens, Summer and other leaders intended; and this was but repeating in recent times what had been done by the English courts in regard to such fundamental laws as the Statute of Uses. There is no Higher Law than a Constitution but evolution applies in law as in nature and statutes and constitutions must find their place also. The organ of that evolution is the court of last resort. Thus it is that statutes do not so much change as supplement, and in this way legislation is but one phase of the growth of the Common Law.

XII

FAMOUS JUDGES

Great men, taken up in any way, are profitable company. We cannot look, however, imperfectly, upon a great man, without gaining something by him.—Thomas Carlyle.

Authorities: Lord Campbell, Lives of the Lord Chancellors. Lives of the Chief Justices. W. D. Lewis, Great American Lawyers. Life of Lord Eldon. Geo. Harris, Life of Lord Hardwicke.

As one looks at the great system called the Common Law, he is beholding a work not made to order, not due to kings or codes, but a gradual accretion built by unknown hands, serving human needs as they arise. The Common Law is the product not only of the bench, but of the bar as well. It is made up, it is true, of the decisions of judges, upon an Anglo-Saxon basis, of judges whose minds were sharpened by Norman law; but these judges could not act except upon material of the cases brought before them and by the decision of points of law raised by the lawyers. The product is majestic, for they builded better than they knew; but it was a process of addition rather than construction. The Common Law is opportunist rather than intended.

Of lawyers, except in modern times, it is vain to seek reminders; of early judges, who were lawyers exalted to the bench, almost the same is true. One can recall the names of Chief Justiciars such as Flambard, Bassett, and the more famous Glanville better known to us as an author, Fitzpeter, Hubert de Burgh, Hugh le de Spencer, and Bracton also more famous as a writer; and early Chief Justices also, such as Ralph de Hengham, Gascoigne and others. For the list is almost as famous as that of the extinct nobility, "entombed in the urns and sepulchres of mortality", named in the noble specimen of judicial oratory of Chief Justice Crewe. But to us they are largely names,—**stat nominis umbra,**—and they are famous more for what they did in the field or in council than as judges. Nevertheless as they obeyed the writ, **breve** and drew to the jurisdiction of the King's Court cases of trespass and land from the local courts and evolved the great system of **assumpsit,** they and their like were our benefactors. They were much like the builders of the great cathedrals of that day; unknown men planned, unknown men built, unknown men gave the money for their construction. The magnificent buildings stand as monuments to unknown men, but they serve and will always serve the needs of mankind, past and to come.

Almost as untraceable, interesting although of less im-

portance, are the court formalities which grew up under these first judges. Gowns go back to the clergy, who as the only men of letters of the early ages were generally the judges. Wigs as we have them were due to French influences, even earlier than the time of Louis XIV and Charles II, and one cannot but suspect a similar origin to that of the coif. The formulas of judicial procedure, from the "Oyez" which opens court to the execution which closes a case, were Norman in origin and in nature. The judicial dignity before which all stand in a courtroom is a joint result of royal commission and the even earlier conception of the divinity of a trial.

English judges unlike the Roman themselves decided law points and trusted neither to royal instructions nor to dicta of jurisconsults. The autocratic James I was to learn from Coke that while the king might sit in the King's Bench he could neither say anything nor influence the judges. Not that they wrote books, although this was sometimes true; not that they enunciated theories, but that they decided contested legal points and that each well considered decision not only was final for the case but became a precedent for the future. The Common Law is case law,—unsystematic but furnishing points for a systematic digesting of law.

And yet while all this is true, there is no country in which judges have played a greater part than in England. Perhaps the age of such unknown architects may be said to cease with the Reformation. At all events, the Renaissance and the Reformation which followed marked the development of mind not only on the continent, where it was largely intellectual, but in England, where it influenced law and industry as much as it did literature. Of Dyer and Popham we say less because it is necessary to say more of Sir Edward Coke, who lived in the time of Elizabeth and James I. He was the embodiment of the Common Law, whether as a commentator on the Tenures of the earlier Littleton, the reporter who systematized rather than copied the words of contemporary decisions, or the compiler of English Institutes; but it was as Chief Justice of the

Common Pleas that he was most famous. Of his private life less good could be said, for his conduct towards Bacon and Essex, once his friends, greatly marred his reputation.

On the other hand his reply to King James when that monarch called the court and asked what they would decide in a case in which he was interested deserves all praise. There on his knees before the king,—as was the custom of the day,—Coke replied that when the case came before him he would decide as became the Chief Justice of England. Coke was unsuccessful in his controversy over in junctions, but made the case as strong for the Common Law courts as the wrong side ever could be presented.

Passing over the great work of Rolle and other republican judges, the purest judicial character was possibly that of Sir Matthew Hale. He too was a judge under Cromwell, but was Chief Justice of the King's Bench under Charles II. It is true that his reputation is marred by his belief in sorcery and his condemnation of witches, but he was broadminded in other things and was as intimate with Baxter as with the Bishops. Hale was as great as a man as he was as a judge although it is an odd fact that he esteemed his divinity writings more than his legal decisions.

Of very different character, and an even greater judge was Sir John Holt, who formed such a contrast to the terrible Jeffreys, who had been both Chief Justice and Chancellor. Holt was Chief Justice of the King's Bench after being distinguished as counsel at the bar. Perhaps his most celebrated judgment was that of Coggs vs. Bernard (2 Lord Raymond 909). In this he showed not only learning, but the power of a judge by incorporating into the Common Law a whole title from the Civil Law. In other words, the law of bailments up to that time was uncertain at most; from his decision in this case it has become one of the best settled in the Common Law. Perhaps the next case in importance was Ashby vs. White (2 Lord Raymond, 938) in which he vindicated the Statute of **Consimili Casu** and applied the Civil Law maxim **Ubi jus ibi remedium** so as to control the action of the returning officers of an election. Of his dignity in court, of his fairness in trying

state cases, of the standing of the bench during his time, too much cannot be said. He established a standard which cannot be surpassed and has been the model ever since his day. And yet of him off the bench curious stories are told. As a young man he had studied at Gray's Inn, but is said to have turned highwayman, either for pleasure or for a living, in the vicinity of London. When he went on the bench one of his old companions was brought before him for trial and they recognized each other. The judge asked the criminal privately what had become of their old companions, and received the answer, "All have been hanged except your Honor and myself." One of the enthusiasts of the day came to him and said that the Almighty had sent him to direct the judge to **nol pros** a case against one of the sect. Holt indignantly ordered him out of the house saying, "Thou art a false prophet. The Almighty knows well enough that **a nol pros** must be sought by the attorney general and not by the Chief Justice."

There were many other eminent judges, but the most distinguished of all in English history was one who was not an Englishman at all. William Murray was a Scotchman who came to England to seek his fortune, illustrating Dr. Johnson's sarcasm that the finest view ever opening on a Scotchman's vision is the road to London. Mansfield was never able to get rid of his accent, but he became Chief Justice of the King's Bench and influential as hardly anyone in directing the policy of the government in the time of the American and French Revolutions. He was so fond of literature that Pope regretted his devotion to law, and when appointed Chief Justice he took a famous farewell of Lincoln's Inn. Of his cases it would be difficult to make a selection. In Campbell vs. Hall (Cowper, 204), he settled the public law as to the kinds of colonies and the powers of their rulers. But it was in borrowing the whole Commercial Law of the continent that he is famous. No less an authority than Justice Buller declares him the founder of the commercial law of England, and indeed he was able to seize the opportunity of England's greatness on the ocean to fix in the Common Law the rules of interna-

tional commerce, which even his contemporary Blackstone was to know only as "the custom of merchants." Perhaps the most famous of his decisions was in Somersett's case, where he declared free a slave brought to England; for, said he, the air of Great Britain is too pure for a slave to breathe. He was often unpopular, however. In the social disturbances of the day his house was burned by a mob and he was the target of bitter attacks by the celebrated Junius.

Serving with Mansfield was his panegyrist Buller, a great judge, although never chief justice. How human a judge may be is shown by his saying that his idea of heaven was to sit at **nisi prius** all day and play at whist all night.

A word at least should be said also about great chancellors. Contemporary with Mansfield was one who was if possible an even greater judge,—Philip Yorke, Lord Hardwicke, who did more than any other man to establish English equity on an impregnable basis. He is declared by Lord Campbell—no mean judge—to have been the most consummate chancellor who ever occupied the English woolsack. Of longer tenure, however, was John Scott, better known as Lord Eldon. He was not a brilliant man, but one of usefulness, a man of great pains. In the judgment of Sir Henry Maine, he was not a legislator in the domain of equity, but a harmonizer. In the fifty volumes of Vesey and other reports he passed upon almost every conceivable question which can arise in equity, and the law of injunction and receivership was established by him, at least in its present form.

Nor do Common Law and Equity judges exhaust the list of judicial worthies. The same expansion of navy and commerce which called for Lord Mansfield brought Sir William Scott, the brother of Lord Eldon, and his successors, who established Amiralty upon the basis which it has ever since held in English law.

But time would fail us to go through the list of great English judges, whether of the last century or now on the bench. Many they were who did lasting work and did it well. Few wrote books, but they were nevertheless the

true jurisconsults of the Common Law, for all who write books go back to principles and cases established by the courts. No law book in English is of value which is based upon the speculations of the author; to be lasting it must rest upon the bedrock of judicial decision.

XIII

THE REPORTERS

The sure foundation of English law, and the sure hold of the lives and property of all Englishmen.—Edmund Burke.

Authorities: J. W. Wallace, The Reporters. The Full English Reprint, (all reports of all the courts.) J. W. Smith, A selection of Leading Cases. Comyns, Digest of English Law. Van Vechten Veeder, The English Reports.

How much the Common Law is indebted to the judges we have already seen. In point of fact the Common Law is practically the creation of the English judges. On the other hand, the decisions of the judges could have had little constructive effect unless they had been preserved for reference. The decision of a court is a judgment and settles the point in question; but it does not contain the opinion which may be expressed at the same time by the judge. Judgments of many courts remain in this condition. The reports to this day of the Supreme Court of Spain are not only impersonal but contain very little reasoning upon the points which have been argued.

The English system has been entirely different, and it is doubtless due to the fact, that, while the courts theoretically represent the king, practically, even since Norman times, the king has not sat in court, and on the other hand judge and counsel have freely discussed everything which has come up. This was first done in Norman French, although the records of the court were generally in Latin. These records go back of the days of what we now call the reports, for the court **Rotuli** seem to begin about the time of Richard I. But the growth of the Inns of Court, the instruction there given by practitioners, and the necessity of understanding the cases in order that they might serve as precedents led to the use and printing of unofficial notes by members of the bar. We have the reports in this way of Jenkins, dating back perhaps to Henry III, while those of Dyer were even called "Reports" and reflected credit upon Middle Temple to which he belonged. Bracton makes references to a thousand cases, although he was not in any sense a reporter. So that it was from a very early date that we have two great legal inventions of the English, perhaps their greatest contributions to law. The one was the reliance upon cases already decided as precedents for cases to be decided, and the other was review of lower courts on appeal. Neither of these was Saxon, neither of

them was Norman, and neither of them goes back to the Civil Law. The use of a case as not only settling the matter before the court but as furnishing the principle for the decision of other cases yet to come is less necessary and therefore less usual where a code is supposed to furnish all principles in advance, while on the other hand it proved essential to the development of the unsystematic Common Law.

English reporting, apart from the sporadic instances mentioned, may be said to begin with the Year Books, which, as now published by the Record Commission and by private reporters before them, extended from Edward I to Henry VIII. They embrace decisions of the court, conversations of bench and bar, and much else that throws a quaint light upon the procedure of the day. It is true that a chief justice was to say that he could get authorities in the Year Books for any side of anything, but perhaps this quality is not confined to the Year Books. Many of them have the highest authority, they were much relied upon in Lincoln's Inn and the Temple, and eminent lawyers strove to make collections of them; and among the more famous collections were those of Sergeant Maynard, Sir Matthew Hale, Lord Redesdale and others. The Year Books have been well called the legal **incunabula**. In passing it may be noted that their case of the rival grammar schools is still high authority on the principle of **damnum absque injuria**. Monks of a priory in Gloucestershire had taught from time beyond the memory of man, when a different master came along and opened a school; the new learning proved so good as to take away scholars from the other. It was held nevertheless that the new man was entitled to what he could make out of his better methods; and this is merely a sample of what can be found in the Year Books.

With Anderson and his contemporaries in the time of Queen Elizabeth we begin the Great Reporters as we now know them. We may name such men as Moore, who had invented the conveyance known as lease and release besides writing the statute of Charitable Uses, Dyer much praised

by Coke, Plowden whom also Coke speaks of as exquisite and elaborate and who is declared by Lord Ellenborough authority not to be excelled, and then Coke himself, whose work is called the Reports **par excellence**. Anderson lived in the time of Queen Elizabeth and on one occasion while on the bench declared that there being a precedent would not influence him if it was a bad precedent, for as a judge he would decide according to reason. In Plowden occurs the curious case discussed anonymously by the gravediggers in Hamlet,—of Mr. Justice Hales, who drowned himself. If Hales was in his lifetime guilty of a felony, then his estate was forfeited to the king, while if the felony was not such until he was dead it was argued that it must have been consummated after he ceased to exist and therefore technically he was not guilty; in such case his estate survived to his widow. The decision was reached, however, that he had committed the act while he was alive, no matter what the consequences might be. Coke was perhaps the most remarkable of all reporters. He has been greatly criticised, for it has been said that he put law into the mouths of the judges rather than reported them. We have the word, however, of his great rival and opponent, Lord Bacon, that until Coke's time the law had been like a ship without ballast, and that the change was due to his Reports.

The Reporters of the Stuart period, themselves as before frequently becoming judges, were often very good. Croke has been the subject of criticism, although praised by Chancellor Kent. A decision of his adverse to ship money gave rise to the witticism that King Charles I might raise funds by **hook** but could not do it by **crook**. Popham tried Sir Walter Raleigh and Guy Fawkes, but his reports do not stand high. Yelverton on the other hand ranks among the best. Personally he was a charming man, a friend of Lord Bacon at Gray's Inn, was correspondingly opposed by Lord Coke, and lost his office as judge through friendship for Buckingham. Hobart stands well, and Sir John Davies first made reports from Ireland standards also in England. His bastinading of another member of the

Middle Temple at a public dinner was famous in its day, and he was made to apologize humbly for this great fault before he was restored. Saunders was one of the great reporters, being spoken of as the most valuable and accurate of his age, indeed, his notes the best since Coke's Commentary on Littleton.

The difficulty now supervenes that, as the reports become more regular and for practical purposes more valuable, it is hard to pick out those which are superior to others. Burrow's reports of the time of Lord Mansfield cannot be surpassed, and some of the Modern Reports and those of Blackstone rank almost as high. The Term Reports of the King's Bench by Durnford & East report Lord Mansfield; while Taunton is equally valuable for the Common Pleas. Indeed, all the courts now had good reporters. Meeson and Wellsby and many others have made the Exchequer Reports as valuable as the other benches. Chancery of the time of Lord Hardwicke and since has been equally fortunate. Peere Williams began a noble system of Chancery Reports, as valuable in America as in England, and the succession has been carried on by Vesey and others. In Admiralty great judges have been worthily reported by Robinson and his successors. Indeed, there have been so many reporters that it is difficult to make a collection even of the best and the Full English Reprint recently carried out in London is a godsend to the profession and to history as well.

It would be anticipating to add to this list any discussion of reporters in America. Nevertheless, for completeness it should be said that while before the time of Chancellor Kent there were few reports and practically none of value, (there were only 150 even in England,) Johnson, Paige, Barbour in New York and some in other states than New York have made reporting as valuable in America as in the old country. In the Supreme Court of the United States, for instance, the reports of Henry Wheaton are unsurpassed, and Peters, Wallace and others are well known. Wallace, it may be noted, was the cultured man who has made the English Reporters so well known by his scholarly book. It would be invidious if not impossible to single out

the best reports of the states, for it has become not only an individual art, but is carried out by the governments themselves on account of its general utility. An incidental but regrettable result is that the name of the reporter now disappears, his identity lost in that of the court which he represents.

The English Reporters continued their individual activity until about the time of the remodeling of the English judicial system. From 1865 the Inns of Court assumed the duty of public reporting, and the Law Reports with their separate divisions according to the divisions of the high court themselves thus became official.

Perhaps we may begin the system of reporting with the Year Books, and think of it as consummated in the present official Reports. From about the time of Elizabeth the old Norman French gives way to vigorous English and the reports of cases become available not only to lawyers, but to historians and to the public as well. No country has such a series of Reports of judicial decisions, for only in England was the law based upon precedent; and the precedents were the more valuable because resulting from the acute debates of lawyers and the impartial decisions of courts, all removed as well from royal as from poltical influences.

XIV

COMMERCIAL LAW

Non erit alia Romae, alia Athenis, alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtenebit.—Cicero.

Authorities: Smith, Mercantile Law. Malynes, **Lex Mercatoria**. Beawes, **Lex Mercatoria**. Clerke vs. Martin, 2 Ld. Raymond, 757, 1 Cranch Rep., App. Note A. J. J. Jusserand, English Wayfaring Life in the Middle Ages. Coggs vs. Bernard, Ld. Raymond, 909. Lickbarrow vs. Mason 6 East R. 21. The Legends of Robin Hood.

Trade was perhaps the beginning of all law except that relating to the moderation of force. Tort and contract are primeval. We have seen reason to suppose that the custom of blood revenge, founded upon primitive instinct, was modified into a system of compensation generally called **wergeld**, and Mr. Justice Holmes in his Common Law has aptly shown how law has evolved from this practice. It is therefore true that all law comes from tort; nevertheless the idea of contract existed, even if it was an exception, almost from the beginning. If two men had articles which they could exchange, the time would come when they would bargain rather than each try to take what he wished by force. In primeval Europe not less than in America we find weapons made of stone having its quarry hundreds of miles away from where they were used. At a date before history begins Greek pottery and other wares are found in the north, and amber from the Baltic seems to have been exchanged in Etruria for the gold of the Mediterranean. A Sacred Way protected the traders and connected the two seas. In historic times the old common law, the Jus Civile, of the Roman citizens was modified by the praetor to conform to the simpler practices which trade had developed among the Phoenicians, Greeks and Egyptians. Wherever we go we find that trade on a small scale or commerce on a large scale has caused or modified civilization. This applies to all ages and lands, is an illustration of Herbert Spencer's rule that society from the beginning has two tendencies, building up two classes,—the military and the industrial.

Commercial law, which governs trade transactions, is therefore of a very early date, and it covers intercourse both on sea and on land. Indeed the one implies the other, for during the Middle Ages not less than in Roman times the raw products of the west and north were carried over the Mediterranean and then overland in Asia to the original markets of the orient to be exchanged for their manufactures. The earliest laws have something to say of maritime

trade. The Rhodian law was adopted by the Romans and still supplies principles of value. The **Consolato del Mar,** probably compiled at Barcelona, regulated the mediaeval commerce of the Mediterranean.

A study of mercantile law, therefore, is a study of the humanizing side of civilization, and this is as true in ancient as in modern times. And the phase of it represented by shipping is of special interest in that it still shows some of the procedure of primitive times. Credit is given to the ship itself, and the ship is liable to arrest and sale for debt, just as the original trader once was on land. It is true personal arrest gradually died out with the growth of individualism,—which required a more flexible procedure,—but that form of it, possibly originating on the Euphrates, by which the creditor took the creditor's property and worked out the debt, that original **vivum vadium,** living mortgage, known as **antichresis,** survived personal slavery for debt, and still is known in the Civil Law. Commercial law is therefore the accompaniment of progress in all ages.

Before the development of highways the sea was the great commercial thoroughfare and in mercantile law we can trace that gradual but irresistible advance, largely due to racial changes and revolutions in Asia, by which the Mediterranean ceased to be the centre of the world's exchanges and the hegemony passed to Western and then to Northern Europe. Thus not long after the Norman Conquest of England the laws of Oleron off the west coast of France show the change of commercial centre, accentuated by the laws of Wisbuy not much later in the Baltic Sea.

But it was the Hanseatic League, originating with Hamburg, Bremen and Lubeck, which brought commerce to its highest point. The Hansa had factories or agencies in all places where wool, hides, wax, timber or other raw materials could be obtained, and by its fleets carried them to the German capitals for manufacture or further shipment to the Mediterranean. The Rhine, the Rhone and other north and south routes built up central Europe, as is attested to this day by the beautiful cathedrals and quaint old towns like Nuremburg which remain. One of these

factories was in London and called the Steel Yard, from the scale which is still used. There the Hanse agents lived apart as in other posts, with their own military protection, all unwittingly teaching the duller English how to trade. The Steel Yard maintained its separate life until the time of Elizabeth, who abolished it because England had by that time learned its lesson and would entertain no strange merchants with their separate customs.

Another phase of the same commercial development is found in the fairs which the mediaeval bishops encouraged within their jurisdiction and which were therefore protected by the sanctity of the church, from Campostella in Spain and Winchester in England to the fairs of Champagne and that of Leipzig,—which alone has survived until our day. St. Bartholomew's Fair in London was the latest in England and has left its trace in literature.

The importance of these assemblies is now forgotten. They flourished in feudal times when there was no security outside of the castles of the nobles and the fairs encouraged by the church, leading, as they sometimes did, to the growth of cities at the crossroads, which acquired charters and fueros, until they could protect themselves. The towns were then small and showed no long rows of shops as in modern times. The trades were few and limited to blacksmiths, shoemakers, tailors, wagonmakers and the like, who lived above their shops. Dry goods and even groceries were obtained at the fairs or from occasional peddlers. Banks, insurance and similar occupations were yet to come, for they are the outgrowth of well developed commerce. The fairs supplied both castles and towns with all but the bare necessities of life, for it was at fairs that everything from dried fish to woollen goods and silks from abroad were sold in the booths lining the passage ways. Leipzig still shows what the great fair at Stourbridge near Cambridge once was, except that Leipzig is almost confined to furs. The streets of that quaint old city at such seasons are given over to shops looking like large upright piano boxes, closed up at night when the traders are asleep within, and let down in front into counters in the daytime. There come traders from adjacent

countries, often Jews, in their different national costumes, with goods stored in accessible places, and the chaffering is universal. Sometimes the trading is lively, sometimes slow and dignified, according to the nature of the country represented, but always there is the wish to buy and sell. The fairs of England developed the Common Law in a way that was unexpected; for the king took them and merchants under his special protection, as we see in Magna Charta itself and realize from stories of forest rovers like Robin Hood of that same epoch. Not only so, but it led to the improvement of ways, which had become mere footpaths or bridle traces; for the old Roman roads were now little more than names, such as Watling Street. These roads, however, had one great advantage, for the active Norman kings took them also under protection, and trespass committed upon any traveler was within the jurisdiction of the royal courts. Not that these courts had much to do with the fairs themslves, for their sessions was infrequent and expensive. The fairs had their own officials, representing the bishop or the city, as the case might be, and their own courts. And there was plenty to do, for, apart from questions of fraud, there were matters of weights and measures, money, quality of goods, consummation of a sale, and the thousand and one matters of trade which required instant solution. There grew up, therefore, special jurisdictions called courts of Pie Powder, which had nothing to do with pie and nothing to do with powder; for this was merely a Norman word meaning foot dust. The point was that the case was decided before the dust of the traders could be shaken from the foot.

It is obvious that such primitive conditions could not last when England became a maritime power. We find the origins of this under Queen Elizabeth, and under Cromwell was passed in 1651 the Navigation Act which confined English commerce to English ships. Already there was the beginning of banks, for trade with foreign countries requires not only sea documents connected with ships, but papers relating the transfer of funds and the security of vessels and cargoes. These did not originate in England. They are Ita-

lian inventions and make up the elements of commercial law covered by the foreign commercial codes above mentioned. They were called in England customs of merchants, —and so they are known even in the commentaries of Blackstone.

As frequently happens in history, a great need calls for a great man. Not only did the wars with France produce a Pitt, but the commercial needs produced a great lawyer. And England not only came to adopt foreign commercial law, but did so through the instrumentality of a great judge, William Murray. Lord Mansfield was one of the most influential statesmen of his day, but at present we are to think of him as Mr. Justice Buller described him in Liekbarrow vs. Mason in his lifetime,—as the founder of the commercial law of England. Of course commercial questions had arisen before his day and had been decided in the King's Bench as well as elsewhere, but the custom of merchats had to be proved like other customs, and the decisions of juries were as various as the opinions of the judges unleaned in mercantile law. Murray came to the Chief Justiceship of the King's Bench as Lord Mansfield at the very beginning of the Seven Years War which was to make England the predominant naval and colonial power of the globe, and during his judicial tenure of over thirty years he passed upon every variety of questions which that political supremacy involved. It is true that admiralty matters were confined to a different court; for the jealousy of Coke and other common lawyers had not been able to prevent the development of the admiralty jurisdiction. That was to become one of the crowning glories of England under Stowell, Lushington and others. But there was glory enough for all, and Lord Mansfield's treatment of the law of insurance, of bills of exchange, of endorsement, of the right to freight, placed the commercial law of England upon a secure basis; it ceased to relate merely to local trades at fairs and covered the globe in its scope. He had at Guildhall what his detractors called a professoinal jury of merchants; and Lord Mansfield and his jurors worked together not only in perfect harmony, but to the great good of the

commercial world.

The crucial point in commercial law lies not only in points which come up for decision, but in the sprit with which these are handled. The English law has always recognized choses in action, for the word itself goes back almost to Norman times; but the necessities of commerce require that commercial claims shall be transferable by mere endorsement. Commercial Law depends upon negotiability of contracts, and the very word shows its foreign origin. It was the glory of Lord Mansfield that he caught the importance of this legal notion and made it a part of the jurisprudence of England and the countries which derive their jurisprudence from her. There was to be development, there was in late times to be legislation; but the principles had become impressed upon English law, and this is largely due to Lord Mansfield. And mercantile law had even broader influences.

Commercial law grew with the growth of the city. It is the antipodes of Feudalism, whose basis was the land, the the estates in the country. It is not unnatural, therefore, that the influence of merchants had much to do with making lands chargeable with debts. The alienation of land goes along with the growth of a mercantile class. In England as elsewhere this consisted at first, as above noted, of foreigness patronized by the King, but the process was the same when the merchants were Englishmen, trading at home and abroad. They needed security for loans, they wanted to invest in lands, they brought about legislation against frauds. The same epoch which on the one side saw the Statute of Westminster II authorize entailment of estates saw that **De Mercatoribus** and that of the later Edward on the statute staple by which the property and at first the body of the debtor could be held in **vivum vadium**. But the line of development was along that begun by the same Statute of Westminster II, permitting a creditor to choose half of the debtor's lands, which he therefore held as tenant by **elegit**. **Such vivum vadium** changes with the abolition of feudal tenures to sale for payment of judgments and common recoveries gave way to the free alienation of modern

times.

Commercial law therefore had influence beyond the custom of merchants and made of that **jus strictum**, the Common Law, something which Englishmen could take with them overseas and could claim as their heritage, whether in public or private relations. And just as the Common Law was never codified, so the English Commercial Law never became a Code of Commerce as in France and Spain. It remained flexible and so could better meet changes called for by new ages.

XV

GROWTH OF THE CIVIL LAW

The department of law where the peculiar genius of the Roman jurists found full scope is the law of obligations, the law of debtor and creditor, the law, in other words, which is most properly concerned with the mutual dealings between man and man.—Rudolph Sohm.

Authorities: Coutume de Paris. Coutume de Bordeaux, (Pothier ed.) Windscheid, **Pandekten Recht**. R. Sohm, Institutes of Roman Law. Vinogradoff, Roman Law in the Middle Ages. Savigny, **Rom. Recht in dem Mittelalter**. **Grand Coutumier de Normandie**. Ihering, Evolution of the Aryan. **Legislación Foral: Viscaya, Galicia, Cataluña, etc.** J. Escriche, **Diccionario Razonado**. C. B. M. Toullier, **Droit Civil Francais**. **Los Códigos Españoles**. Code Napoleon.

One of the best ways to study a subject is to contrast it with others. Thus, in our study of the Common Law, it will be advantageous to compare it with the Civil Law, which not only flourished at the same time on the other side of the Channel, but which we have seen furnished some principles to the Common Law itself. The vitality of the one may be measured by the influence or lack of influence of the other.

The popular view of the Civil Law is that it is Roman law, and that it becomes more and more pure in proportion as it throws off temporary accretions due to circumstances and in particular to the Germanic survivals. There is no doubt that the Spanish Civil Code, for example, can be better understood by looking at the same time at Justinian's Code; nevertheless, it is a serious mistake to think of the former as derived entirely from the latter. It is true that Spain retained much of the ancient vigor, and that while France represents Greek elegance Spain represents more of Roman force. Nevertheless both Spain and France received a Germanic infusion which influenced even their civil codes. Indeed, this will be found to be the case in Italy, the home of Roman law, just as conversely the Roman element will be found to predominate in German law, excepting in the matter of land titles and customs.

Modern history really begins with Charlemagne, especially when he crowned himself Emperor of the West in A. D. 800. The Germanic invasions were over with, and a great organizer had arisen who sought to unify the West according to the old Roman idea. Nevertheless, Charlemagne was not only a German himself, but he did not aim in his Capitularies to make many changes in private law. As to the military, judiciary, court procedure, even the church and education, yes,—but as to the relations of man to man, as to persons, family, successions, property and obligations the Capitularies have little to say. As in Eng-

land the Germanic invaders brought their customs, and except so far as these were to be changed by the growth of royal courts under the **missi** whom Charlemagne sent out to do justice, there was to be little change in the relations of man to man in private life. And this was true not only in the Frankish north, from the Loire to the Rhine, but in the Burgundian lands about the Rhone, and the Visigothic southwest centering at Toulouse,—and indeed extending over the peninsula of Spain, then semi-independent. Within these three or four limits each district after Charlemagne's time developed its own peculiarities, although Burgundy, lying between Romance territories in France and Italy, gradually became Latin also. Nevertheless, even Burgundy has been lately shown to retain much in the way of Germanic origins.

Italy alone can be said to have kept the Roman law practically in its entirety and to have considered it as a Common Law. In part this was due to the fact that Justinian and his successors had held a great deal of the peninsula, ruling it from Ravenna, just as they did also the eastern coast of Spain. Nevertheless it was in northern Italy, in the country of the Lombards, that legal study first began, originally with the Lombard customs, but afterwards extending to Roman law also. Thus, there came the school of Glossators, who from the twelfth century compared passage with passage in the works compiled under Justinian, particularly after the re-study, if not discovery, of the Pandects at Amalfi. The most famous of these teachers was Irnerius, who founded a school. Perhaps even more important, however, was the later school called the Commentators, under Bartolus and others, who flourished after the semi-Renaissance of the twelfth and thirteenth centuries. These were the first to study the Roman law in order to develop the principles which were involved. Their definitions and other critical work have not been surpassed and may be said to be the foundation of modern law study. This work had not been done by the Roman jurisconsults.

Nor were these studies confined to Italy; for schools

of law and medicine extended from the peninsula over Europe. This was the age of the origin of the Universities, patronized both by popes and kings. The most famous came to be that of Paris, flanked on the one side by Salamanca in Spain and later by Leipzig in Germany. Perhaps as important was the royal influence, such as that of St. Louis in his **Etablissemens**, followed by edicts and later by **Ordonnances** of different kings covering many subjects, mainly political and military. These not only formed the rules of practice for the courts, which under the royal **baillis** encroached upon the local tribunals, but gave rise to the profession of lawyers, called the Robe, who were much more interested in the **Droit Ecrit** coming from the south and in the laws promulgated by the kings than in the old German customs which survived in the country and among the common people. The most famous of the law schools perhaps was that of Bourges, and perhaps the greatest of the law teachers was Cujas,—Cujaccius in Latin,—who taught there. He lived at the time of the religious wars, wars which could bring a St. Bartholomew, which could divide families as well as France itself; nevertheless he preserved an academic serenity, and, although a Protestant, took no part in religious discussions. Said he calmly, **Nihil hoc ad edictum praetoris pertinet**. It is said that for centuries when the name of Cujas was mentioned students would rise in respect, or if abroad would remove their hats.

The Roman law was patronized by kings and the learned, but it had to fight its way against the popular customs, which in their turn gradually became more definite and assumed the shape of **Coutumes**. These were the true Common Law of France, differing, however, in different districts. They preserved Germanic status traditions, varied by local needs, as to the relation of husband and wife, the authority of the father over his children, the interest which the wife had in the property of the husband, known as **Douaire**, and surviving from the old **Morgengabe**, the rights of inheritance of children and collaterals, the rules as to planting and gathering crops, supervised by the heads of the local communities, the family right of preemption of

estates in **retrait lignager**, and such contracts and torts as the simple agricultural life of the day permitted.

Perhaps not unnaturally the principal collection was that in use at the capital, and the **Coutume de Paris** influenced all the districts of northern France. It was commented by great writers, although in this respect probably it received less attention than the **Coutume de Bordeaux**, which was redacted finally by no less a man than Pothier, one of the master minds of France. Louis XIV was to decree great **Ordonnances**, such as that of the Marine, but he likewise increased the influence of the **Coutume de Paris**, which was extended to the French colonies first in Canada and afterwards in Louisiana, where it took firm root. And of this development a charming proof and evidence is found in the **Causes Celebres**.

It is quite true that all this time there was enforced a law which aimed to control marriage, divorce, legitimacy, wills and succession, and indeed would have extended itself to contracts by having them made under oath. This was the Canon Law, gradually developed by the church and enforced by ecclesiastical courts, whether in England or on the continent. There is no doubt that it greatly modified and indeed unified Germanic customs on these points; nevertheless there remained a large field for customs and except possibly in Italy they maintained their ground in many particulars. In Spain the customs were known as **fueros**, generally in writing and granted by the Castilian kings to cities won back in the long duel with the Moors or established by monarchs in depopulated districts in order to encourage immigrants. These **fueros**, it is true, had political features. Very many of them gave practical independence to the towns, sometimes forbidding the collection of royal taxes, sometimes forbidding even the entry of royal officers for any purpose, but always containing rules as to persons and property, family and succession law, although little as to contracts and torts because the limited civilization of the day made these less important titles. In course of time the **fueros** were characteristic rather of districts rather than of towns, but they re-

mained, and indeed despite the modern Civil Code still remain characteristically Spanish, and their spirit at least migrated with the Spanish colonists to America. Possibly the most acute of modern writers of Spain was Ganivet, who unfortunately ended his own life before it had reached its full maturity. Ganivet it was who declared that the full fruition of Spanish character was for each Spaniard to have in his pocket an individual **fuero,** which should authorize him to do whatever he pleased. This, of course, is the antipodes of law, and is his explanation why the peninsula was so long in becoming a unity—if indeed it has become such—despite the **Siete Partidas** of the sainted Ferdinand, which made the Roman law the basis of Spanish. This is called by Altamira the Penetration of the Roman law. It was aided by the effort of Ferdinand and Isabella and more particularly of Charles V and the most methodical despot of them all, Philip II. Nevertheless, the very number of the Recopilaciones and other compilations in the history of Spanish law shows the difficulty of unification, and to this day an article of the Civil Code provides that the code shall not apply in the districts of the **fueros**.

One would suppose that the country beyond the Rhine, the original Teutonia, would develop its own Common Law, perhaps different from the English, but following the same method of growth. The **ignis fatuus** of the Holy Roman Empire, however, prevented this and caused a continuous approximation to Roman models. There came a Reception of the Roman Law, which was in some respects more complete than anywhere else, for it superseded German customs except so far as they were preserved by the Land Code of Frederick the Great. Savigny opposed the adoption of the Code Napoleon, which we shall later study, but Niebuhr's historical investigations and particularly his discovery of the lost manuscript of Gaius at Verona brought a loved and study of Roman law unequalled elsewhere. Mommsen was later to aid learning by his editions of the Roman codes and digests, which even superseded those of the mediaeval Frenchmen. Windscheid—permit a student to call his teacher the lovable Windscheid—made the Pandects a living book.

He almost made Roman law the basis of a projected German Code, but as to this was prevented by the equally great scholar Ihering. However, this is looking ahead.

Clear it is, therefore, that the modern Civil Law, at least outside of Germany, is a joint product of Roman law and Germanic customs, much as the Romance tongues show the same process. Both law and language have been accommodated to modern needs. In England the Common Law is the customs of Middlesex extended to the whole realm, with Roman law practically excluded altogether. On the continent there has been a union of the native and the foreign; the Latin love of order and beauty has made of Roman law and Germanic customs one thing,—which we call the Civil Law.

XVI

TRANSMIGRATION OF THE COMMON LAW

What are loosely spoken of as national characteristics are probably a result not so much of heredity as of controlling traditions.—Edward Eggleston.

Authorities: Wm. Blackstone, Commentaries. E. Eggleston, Transit of Civilization. Wm. Macdonald, Select Charters, etc., illustrative of American History.

The definition of law since the time of Austin is a rule of conduct prescribed by a superior. In point of fact we have seen that this superior, the state, is itself an evolution and that law developed from custom of the tribe and clan antedating the state. But whether it be state or clan, law is the rule of conduct of the humanity concerned, and hence the movements of humanity, whether by way of migration or development, have affected the form of its law. Twice already migrations have concerned us greatly. The first time was when the Anglo-Saxons occupied Britain; the second was when the northmen, become Normans, seized the government of England. A different and a greater migration now confronts us.

The Reformation was an outgrowth of the Renaissance, being the awakening of conscience as the other had been the revival of learning. In time there were to come those revolutions which marked a political awakening also; but for the time being we are concerned with some fruits of the Reformation period. The discovery of America was by the Catholic Spaniards, and they were to settle it permanently from the Gulf of Mexico to Patagonia; but the temperate zones of North America were in fact occupied by the French and English, and the Protestant English were finally to create the United States. The settlement of America by the English was not a religious movement, but it grew out of the Reformation. That is to say, England became Protestant and the religious and civil disturbances in England led to the migration which settled the thirteen colonies.

The begining of English colonization was under Queen Elizabeth and was due to the restless activity of her favorite, Sir Walter Raleigh, who, however, was only representative of his time. It was in this way that the colony, although unsuccessful in its first settlement on Roanoke Island, received the name of Virginia, and it was the Virginia Company which acting under its wide charter made the momentous colonization beginning in 1607 at James-

town. There is no doubt that in this there was involved the same spirit of adventure and the same hope of gold and silver which was inspiring the Spaniards further south; but although Cervantes had laughed at chivalry in Don Quixote, chivalry yet persisted in the peninsula, while it was passing away in England with the very age of Elizabeth. The abolition of the monasteries by her father had thrown much land open, it is true, but it passed to a greedy nobility, and the extension of sheep raising was driving the yeomen away from their old homes at the very time that great sailors were making the English name terrible in war and familiar in trade in all parts of the world. Following the Dutch model, companies were being organized to trade with the Levant, with Muscovy, and with every other land and coast which was known. The Virginia Company was a part of this movement, having also the definite object of colonization. In point of fact, no precious metals were discovered, but agriculture and in particular tobacco was made the basis of the new settlement. The nature of the colonization was different from that of the Spanish in one great particular; the English would not mix with the Indians, as did the Spaniards and even the French, but by constant wars won the land step by step for Anglo-Saxon farms and towns.

Shortly afterwards came a settlement at Plymouth Rock based upon religious motives, and from the Puritan colony, which followed, branched off different offshoots, in time making up what was called New England; but except so far as the climate was different, the methods of colonization were the same, except slavery obtained a hold in the South, while it did not flourish in the North; the plantation system, with a wider political unit in the county, was found appropriate in Virginia, while the closely built villages of New England called for smaller townships and ultimately for a more intensive education of the people.

These two settlements were typical, but one at Charleston marked almost a third basis of civilization; for while it preserved the southern elements which it brought from the Island of Barbadoes, it preserved also the active

if feudal character for which that island had been famous. In course of time came other settlements, such as the vast territory given to William Penn as his own, the conquest from the Dutch granted by Charles II to his brother and hence called New York; the Catholic settlement with its capital named for Lord Baltimore; and that strange theoretical government drawn by the philosopher John Locke for his friends Clarendon and others, to be known as North Carolina. Delaware and New Jersey were incidental to other grants, and the list was closed by Oglethorpe's settlement about Savannah, which showed its date in the name of Georgia.

But what did these colonists take with them? Of religious or political principles we need not speak, but what was the civil law which Captain John Smith, the Puritans, and the Carolinians claimed? What was their family law, what of contracts? It is quite likely that in point of fact they did not know precisely what went with them as their legal make-up, for they disputed more about religious creeds and forms of government. Nevertheless, there were personal rights and rights of property, duties connected with family and with inheritance, and the age which was making contract the basis of government was the one which was insisting upon contracts in all the various forms which trade could bring by sea and land. Torts for the time being sank into insignificance, because so far as they concerned the Indians they were absorbed in the greater matter of war, and on the other hand pioneers were more interested in building their separate homes in the wilderness than in seeking grounds of suits among themselves. What law was brought by the colonists appears at least in a general form in the charters granted by the different kings to these adventurers.

Typical of all was the first charter of Virginia in the year before Jamestown was founded, drawn in England, and giving the views of that day. It provided that these subjects and their children should have and enjoy all liberties, franchises and immunities to all intents and purposes as if they had remained within the realm of England; and

this covered civil as well as political rights. The essence of the contract theory of the time, antedating Locke, is found in the Mayflower compact, where the subscribers in the presence of God and of each other combined themselves into a civil body politic, which should enact such just and equal laws as would be most meet for the general good of the colony, unto which was promised all due submission and obedience. The patent of the council for New England of the same date also provides for all manner of laws, but contains the provision, which came to be fundamental everywhere, that these must not be contrary to the laws and statutes of the realm of England, as had already been expressed in the second charter of Virginia. Much the same was true of all the other colonies, except that to Maryland was added the provision that Lord Baltimore should erect manors having courts baron, with oversight of "frank pledge". The charter of Carolina granted the right to the proprietors to ordain orders and ordinances to be inviolably observed, but these too must be as near as may be agreeable to the laws and statutes of England and must not take away the right or interest of any person in his freehold, goods or chattels. Each colonial charter was a revised Magna Charta.

Gradually the colonies grew and although their governments could be politically classed as proprietary, charter and royal, they were to assimilate themselves gradually to one model. Ultimately, we get light reflected back which will illumine our inquiry as to private law; in the declaration and resolves of the first Continental Congress we find that "inhabitants of the English colonies by the immutable laws of nature, the principles of the English Constitution and the several charters are entitled to life, liberty and property." Their ancestors at the time of emigration were entitled to all the rights, liberties and immunities of free natural born subjects within the realm of England and lost none of these by emigration. It was even declared that certain named statutes were in force in America and others not, but the ground of the whole proceeding was "that the respective colonies are entitled to the Common

Law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law".

So much interest has centered upon the political side of colonial life and so much exciting occurred in the Indian wars that little attention has been paid to the personal relations of man and man which underlay everything else. It is true that the Common Law varied in different parts of England. In the Virginia charter it was contemplated that some of the settlers should come from London and some from Bristol, and these had different customs; nevertheless, it was possible to speak of a Common Law for the whole of England, and it was this which the colonists brought with them to the New World. And it was the very fact that these principles were not written down in codes but were flexible in their application that made it possible for the Common Law to take root and have a new and vigorous growth under such different conditions.

New conditions of course brought new points of view. Family relations of the colonists remained as at home, at least for several generations. Land became the basis of the new settlements, and if the overhead grant was to nobles, the nobles remained in England and it was the sub-grantees who came and really formed the colonists. Whatever feudal characteristics there were at first, these were found unsuited to pioneer conditions, and the usual tenure came to be free and common socage, and inheritance that of all children equally, as in Kent.

Courts might be officered and named as in England, but the practical question was always not precedents but results. The jury was of more importance than the presiding judge, and the simpler the rules of evidence, the more easily they could be understood and applied.

The first settlers were English and nothing else, with the same love of liberty and with the same submission to persons in authority. But a few years convinced them of the absolute equality of men as such. All who could work and could fight, stood on an equality; and few generations passed before equality was ingrained in the colonial char-

acter. This was to show itself politically after a while, but it showed itself even earlier in private law. As soon as charters conferred the right of legislation this feature was seen, and indeed it prevailed in practice before it was written down in legislation. In the new world as among the earlier Saxons law was what the people observed; custom was always the beginning of law. The Common Law transmigrated so far as it was suited to colonial conditions and new needs made over the Common Law where necessary.

XVII

THE COMMON LAW IN THE COLONIES

The distinction between the colonial and the indigenous character is the distinction of the plucky, more energetic disposition with the natural bent to rule, and the more yielding, indolent home class.—Lamprecht.

Authorities: P. S. Reinsch, English Common Law in the Early American Colonies. S. D. Wilson, Courts of Chancery in the American Colonies. Theo. Roosevelt, The Winning of the West. Justin Winsor, Narrative and Critical History of America. John Fiske, Virginia and Her Neighbors.

The English colonists brought with them to the New World the principles of the Common Law. The provisions of the Common Law differed in the south of England from what they were on the eastern coast and from what they were towards the Welsh border, and they were to be different in New England from what they were in Virginia and the South. Local surroundings were to cause great variations in the New World as in the Old; but the substance was much the same.

The chief difference will be found to be connected with the new and freer conditions of American life. English historical tendencies had not obliterated the distinction of nobility and commons, whether in political or in social life. It was possible to pass from one condition to the other, but it was difficult.

In America on the other hand all men who could shoulder a musket or guide a plow stood on an equality. The frontier was to move gradually westward, but there was always a frontier towards which the younger and more vigorous element migrated, and news from the west as well as traditions in old families tended in the same direction of individualism. This will be found to be the controlling element in American life even from the beginning, and, although not always realized, was to remain the basis until the present time. How this tendency affected the different branches of private law is well worty of investigation.

In the law as to persons it must be remembered that the nobility did not emigrate to America. Nobles received grants of land from the king, always accompanied by the condition expressed or implied that the colonists were to be governed by laws of their own making. Not only was the tendency towards one model, the crown colony, where the governor was appointed by the king and a legislature elected by the people, but as the nobles never came to live on their grants there did not grow up the aristocratic conditions which controlled in the old country. This was em-

inently so in New England; in Virginia great families like the Fairfaxes, Lees, Washingtons and others flourished in the tidewater district, but the Scotch-Irish immigration in the mountain country to the west formed a distinct counterpoise. The early process of bringing over apprentices under indenture for a term of years had little effect in the long run; the terms ran out and the indentured colonists dispersed in different directions to make their own fortunes. African slavery was ultimately to have great results. It was legal in all the thirteen colonies, but became rare in the north because negroes do not flourish except in a warm climate. The slaves were originally purchased from the Spanish West Indies, but afterwards brought direct from Guinea through slave traders, not a few of whom were New Englanders. The new slaves had to be carefully guarded, and this maintained in the South a broad supervision and a military spirit which came to be lacking in the more commercial North. The history of civilization everywhere, however, is the gradual melioration of human conditions. In the South the life on plantations, the acquired docility of the bulk of the negroes, and the natural kindliness of the masters developed a feudal type of civilization unique in the world. Technically it was thought of as villeinage, but it concerned an alien race of an entirely different color and physical build and came to have features all its own. It came to appear as natural to the southerners from their familiarity with it as for the opposite reason it was distasteful to northerners. In this difference was the power and potency of great social changes; but these were far in the future. New England conditions, on the other hand, tended to develop equality among a white Puritan population. There was incessant discussion, but it was more especially with regard to creeds and religious observances. There was a general uniformity of conditions upon the small and not very fertile farms and in the towns and villages, which marked acquisitions from the Indians and centered about the churches. Sometimes a church was divided against itself and one branch seceded to found a new community. New England emigra-

tion settled much of the northern part of New York, and one of its interesting features was seen when a church emigrated,—as from Connecticut to the wilds of New Jersey and set up a new ecclesistical community called Newark.

Under these changing conditions family life assumed a new phase. In New England it was possible for a family to remain in one place or in close touch, but even there the young pople hardly waited to be twenty-one years of age before seeking other homes. It would have been impossible to develop such an institution as the old gens in which a grandfather or greatgrandfather ruled a community of his descendants, for in hardly any place would there be many descendants living together for any length of time. This had the tendency to equalize all colonists, for wherever they went, and wherever they came from, they met under similar conditions, and felt the need of similar laws. In this way there came to be a silent and unintended development of the simpler parts of the common law. A marriage was regarded as a contract as well as a sacrament, and ties of the half blood, growing out of second marriages, were as highly regarded as any other. There tended to be therefore a gradual equality of kindred, whether of the whole or half blood. Similarly the right of the wife to a child's share or more of the husband's personalty and to the enjoyment for life of the homestead and of one third of all his real property became perhaps even more uniform in America than in England; for there was not the yoke of old customs while there was the working out of the declaration in the charters that English laws were effective only so far as they were applicable to the new conditions.

The same process applied to property in general. In England there had been prevalent the old Mediterranean community farming. This was totally inapplicable in America, where the typical home was that of the pioneer living in a log cabin built in a lonely valley, keeping in touch with a colonial fort, his whole family armed to resist hostile Indians. The plowing and cultivation under these circumstances, which gave the tone to the whole so-

cial development, was that of the farmer and his sons, aided in the South by his black dependents, known rather as "men" than as "slaves" Individual ownership of farms therefore came to be the rule, as much a product of necessity as individual ownership of the house had come to be in towns, whether in England or America. Self-reliance was necessary to success under these pioneer conditions and self-reliance emphasized individual property as well as every other kind of individualism. The Puritan compact in the cabin of the Mayflower might be theoretical; that of the Watauga settlers under the oak in Tennessee was essentially practical.

Thus, primogeniture was not transplanted as part of the Common Law. The widow was allowed the home and dower upon her husband's death, but the children shared almost everything else equally. From the necessity of the case the husband might have to look after his wife's property, but if the Common Law control passed to him, the actual ownership of the wife was well understood and was enforced on equitable principles, if necessary. So far did individualism go that wills assumed a different rank from those in civil law countries, although they originated at Rome. The father was universally recognized as having the right to leave his property as he pleased and even to disinherit children. There was no such thing as a child's legal share which the father could not take away. Practically this right was modified by public opinion, for a will was not a deed to be put on record, but an instrument which had to be probated by a court before it became effective. Disputed facts were in this case as in all others settled by a jury of the vicinage; so that after all the question of disinheritance came under the control of public opinion and the doctrine of undue influence over the parent became as much a part of private law as the power of cutting off an heir by the parent.

The law of obligations was of slow growth in America, as it had been in England. Torts were not important where people were not in close touch with each other, and the law of contracts, at least on the commercial side, had lit-

tle field of operation. Contracts flourished as to disposition of lands, and commercial interests gradually expanded in New England, but the early English policy was almost as repressive as the Spanish in regard to colonial enterprise. Virginia found that her iron industry was not permitted to grow for fear of interfering with that of the north of England, and the same policy was followed more or less in everything. Cotton was to become the staple growth of the Southern States, but not under colonial conditions, and indeed not until Whitney invented an "engine", or gin, which permitted the staple to be cleared from the seed with a speed which was impossible by hand. Nevertheless, business flourished, cities developed, and so long as people were allowed as Englishmen to make their own local laws there was little dissatisfaction. The Common Law had not only been transplanted to America, but its principles were assuming forms suited to the new conditions.

English courts did not come to the colonies, for their procedure and the formality connected with judges and lawyers were not suited to America. There were, however, local courts, some of which retained English names. The court of chancery was not a favorite because it was supposed to be complicated and technical, but nevertheless it existed in New York, New Jersey and elsewhere, and its principles were enforced even where the court did not exist as such. Thus both Massachusetts and Pennsylvania administered equitable principles in their Common Law courts. The judiciary, however, cannot be said to have been a favorite part of English institutions in the colonies. The tendency was to widen the scope of the jury and thus practically questions of private law were largely settled by public opinion just as on a different plane political matters came to have the same arbiter. Men united in all the societies and unions which seem so natural to humanity, but corporations were as yet unknown. Individuality in private life, individualism in public life marked colonial days. There came to be not only English liberty, but a tendency to equality unknown in England.

XVIII

SPANISH COLONIAL LAW

Porque siendo de una corona los reinos de Castilla y de las Indias, las leyes y orden de gobierno de los unos y de los otros deben ser los más semejantes y conformes que se pueda.—Philip II.

Authorities.—Leyes de las Indias. R. Altamira, **Historia de España.** C. Pereyra, **Obra de España en América.** J. C. Salas, **Los Indios Caribes.** B. de las Casas, **Destrucción de las Indias.** J. M. Zamora, **Biblioteca de Legislación Ultramarina.**

At the time of the English colonial devlopment Florida, Louisiana and Texas, and of course what is now California and adjacent territory, were Latin and subject to Latin institutions. Louisiana was originally French, but its land system was modified by the Spaniards. On account of these states having Latin institutions, and more particularly by way of contrast to the Saxon colonial system, it is expedient to complete our colonial study by taking in also Spanish Colonial Law.

Of course it all begins with the discovery by Columbus in 1492. Then in early times the centre of influence was Santo Domingo and the West India Islands, and there Spanish institutions obtained their first hold. With the conquest of Mexico and with that of Peru in the time of Charles V the centre of influence drifted to the Tierra Firma. Indeed America was the basis of Spanish world influence from the discovery of the silver cerro at Potosi in 1545, for from it was taken first and last metal to the value of two billion dollars,—worth much more in those times.

The crux of the Spanish system, however, lay in the treatment of the natives. While many of the old customs were retained, the Spanish municipal system was introduced, and Spanish governors succeeded to the absolute power formerly exercised by the native chiefs. The contact of Spanish colonists and Indian natives was the basis of royal legislation. With the governmental institution we have for our purposes nothing to do, but civil law in Spanish America, as in England, in Rome, or anywhere else, touched persons and property, and in America as in Europe may be considered under the five heads, of Persons, Family, Sucession, Property, and Obligations.

Spanish Colonial Law was finally concentrated in the **Leyes de las Indias** This began 1503 with Isabella's letter to Ovando in Hispañola, was widened by the Laws of Burgos, and increased in all directions by **cedulas** and laws sent over to meet different occasions. Philip II moulded Span-

ish character as no one before or since, and digested its laws in the **Nueva Recopilación**. He was without doubt one if the great rulers of history, and his ambition was from his plain little room in the Escorial to rule, with paper and pencil both worlds, the New and Old. He planned a **recopilación** for America, but it was not until almost a hundred years after his death that the plan was finally carried out in the shape of the **Leyes de las Indias**, dating from 1680. In them he declares, "Porque siendo de una corona los reinos de Castilla y de las Indias, las leyes y orden de gobierno de los unos y de los otros deben ser los más semejantes y conformes que se pueda." (Book II, Tit. II, Ley 13). They consist of nine books, but it is characteristic of of the monarch, with his minute regulation of private as well as public affairs, that the larger part of the work is taken up with matters of government. The civil law is mainly in Book VI.

First, them, as to Persons. The greatest change comes from the Spanish treatment of the natives. The Portuguese were already enslaving Africas, and the Spanish colonizers found their own greatest difficulties in connection with the fierce Caribs, who inhabited the north coast of South America and most of the West Indies. The Arawak race was milder, but were soon confounded with the Caribs, whom the Spanish represented as cannibals. The result was that even the gentle Isabella permitted the enslavement of Caribs. The Indians were all in the Stone Age.

Las Casas, who flourished in the first half of the 16th century, declared, that the **encomienda** was oppression of the worst kind and had resulted in the extinction in America of twelve million natives in a half century. This is undoubtedly an exaggeration, but Las Casas persuaded the king to abolish this virtual slavery by the New Laws of 1542, which provided that such rights should not descend to widows and children but be for life only and reverted to the King. As the natives did not take to labor of the kind needed by the colonists, whether in fields or mines, they were gradually exterminated, with the result that in the West Indies comparatively little was left of the Indian

stock. This was not true on the continent.

The division of natives among the colonists for labor in mine or field was called **encomienda**, from privileges once allowed the religious orders in Spain, and so far as it could be accomplished by decrees and writings it was planned to protect the Indians from oppression. The interests and protest of the **colonos**, however, were too strong. In Spain as in Russia public opinion overrode even absolute monarchy. The New Laws were repealed within three years, as Altamira says with the only result of a nominal abolition of slavery for the Indians and a direction that their good customs should be respected. Meantime Las Casas had endeavored to find a substitute for the forced labor of Indians in the importation of African slaves; but he lived to rigret the substitution. So that about the time that Spain became a world power, based upon the silver of Potosi, negro slavery took a firm hold upon the Spanish possessions. Indeed it became a political question, regulated by treaties between Spain and other countries, such as Holland and even England, know as the **Asiento**. Humboldt was to estimate at the beginning of the 19th century that six million negroes had been torn from Africa and brought to America or died in the Middle Passage.

The second element of civil law is the Family, and here again the law is connected with the Indian question. From the beginning both church and state had encouraged the colonists to intermarry with the Indian women. Spain already had possessions in Africa and at home in the Moors was familiar with dark skinned subjects. The king, therefore, thought of the Indians as American Spaniards, although with a difference. The result varied in different districts. In the West Indies there was less Indian blood left that in Mexico where all became almost altogether Indian in course of time. In the West Indies even the white strain was different from South America, for insular immigration came from Andalucía, so largely tinctured by the Moors, while the La Plata region was settled by Basques and Gallegos, rougher but of greater energy. Even when during Napoleonic times revolution severed the Spanish

colonies from the mother country the great **libertador** Bolívar advocated the same policy of equality and intermarriage. Indeed, he extended it also to the negro race, and it has been the shibboleth of Latin American writers and statesmen ever since, except perhaps in Costa Rica and to a more limited extent in the Argentine. The result has been that Latin America shows more equality of population than North America. In North America the policy has been somewhat that of Captain John Smith, of Pocahontas fame, who said that the only good Indian is dead Indian. Whatever may be thought of the right and wrong of the method, the process has caused an extension of the white race from the Atlantic to the Pacific, with the gradual extinction of the red race, except in certain reservations and in the one state of Oklahoma. The negroes flourish, it is true, bnt intermarriage is tabooed. The equality of Latin America has resulted in a mixed race, while the exclusiveness of North America has resulted in a pure white race, modified only by subsequent white immigration.

Taking up next the matter of Property, we find that the Spanish policy contemplated that every colonist should have land. In towns he should have a house lot and garden, together with the commons of pasture appurtenant to the town,—not dissimilar in fact to the communal customs of the Indians themselves. In the country the division of Indians was accompanied by the repartimiento of lands for them to work, whether agricultural or mining, until **encomienda** and **repartimiento** were almost confounded. An interesting book by Pereyra on the **Obra de España en América** shows with what care the monarch sent seed, implements, horses, cattle, trees and everything that his paternal care could think of, and on the other hand how he introduced American products into Spain. He did everything for the colonists except develop a feeling of self-reliance,—and this was the fatal defect of the Spanish colonial system. Of the mines and everything else one fifth went to the king. With the decline of Spanish shipping due to the rise of the Dutch, French and English, and particularly to the unwise favoring of the port of Seville at the expense of

all others, came the decadence of the peninsula. Nevertheless it is to Spain, after the gold fever passed, that America owes the introduction of such staples as coffee and sugar cane. Tobacco and cotton were native. Property consisted then as always of land and personalty, held upon terms prescribed by the **Leyes de las Indias**.

Of Inheritance or Succession little need be said, as it followed the rules prevalent in Spain, with perhaps fuller survival of the tribal ownership of land. So in Obligations there was nothing new in regard to delicts or torts. It was in the province of Contracts that the Spanish system showed greatest fruit. Contract prevailed in regard to all the activities of life, but the peculiarity was that everything was under regulation. This was true not only of post offices but of farm leases, not only mines but of pearl fishing. And all industry encouraged by Spain was extractive, that is, consisted in the taking of the raw material from America to Spain, not in the growth of local industry or of manufactures. And the minutest details of life were regulated. The greatest instance is found in Paraguay, a religious experiment by the Jesuits, begun with the most altruistic motives. The fathers found that the natives would not work, and so began the process of reduction, as it was called, by which the Indians, as in Florida and Texas, were gathered in **pueblos**, and given different tasks, here at least often of manufacture. They were well cared for, but in Paraguay even more than in the rest of America self-reliance was unknown. What initiative these natives had had was absolutely lost when the Order of Jesuits was expelled in 1769. This was an extreme case, but the principle was much the same all over America. As Salas says in his **Indios Caribes**, a love of formality was generated, a reliance upon documents, a constant weaving and unweaving like Penelope's activity with no permanent result, which tended to become ingrained in colonial character. It is seen in the courts also, in the **audiencias** of the continent and extending from Porto Rico to the Philippines. The judges had administrative as well as judicial functions and as in Spain their decisions were formal judgments and never discussed

principles, as in American courts. Spain did not even adopt from England written reports for her Supreme Court until 1839.

Such was the Spanish colonial system,—its care exceeding that even of the mother bird who brings everything to the waiting beaks. For there comes a time, as in the tree out on the campus, when the mother bird thinks the little one should leave the nest; and so she pushes it to the edge and out in the air,—to fly or perish, as may happen. This was what occurred in the English colonies. Up there prevailed the policy, unintentional but actual, of salutary neglect. The result was the colonists had to shift for themselves, evolve their own law, public and private, upon bases which they themselves brought from the home country, until at last they developed the greatest individualism found upon the globe. And such is ever the contrast between paternalism and individualism.

XIX

THE AGE OF INDEPENDENCE

The God who gave us life gave us liberty at the same time.—Thomas Jefferson.

Authorities: G. T. Curtis, History of the Origin, etc., of the Constitution of the United States. Jas. Madison, Journal of Constitutional Convention. A. Hamilton, et al., The Federalist. P. S. Reinsch, Short Bibliography of American Colonial Law. Among documents the principal ones are the Declaration of Independence, the State Constitutions, the Ordinance of the North West Territory, and the U. S. Constitution.

When the time came for the colonies to assume among the nations on the world that equal and independent station to which they were entitled by the laws of nature and of nature's God they had already reached a high degree of maturity. When they threw off the power of the king it was necessary to rearrange their charters to meet new conditions. The Articles of Confederation were political in nature and being a mere league were not intended to alter the private law of each state, as the colonies now called themselves. At the suggestion of the Continental Congress, these states each adopted an organic act, generally known as a constitution, and, while designed to conserve political rights, nevertheless instituted a government for the purpose of preserving also those rights of person and property and procedure which had come down to them from their English ancestors. The Constitution of the United States adopted in 1787, and which went into effect two years later under Washington as the first President, was intended to create for some purposes one country, for as a constitution it acted upon the individuals of all America, regardless of state lines; nevertheless, private law cannot be understood without fixing the mind almost entirely upon the thirteen states and the new ones which were gradually admitted. Even the ten amendments added immediately to the national Constitution, made up largely from Magna Charta and the Bill of Rights, were designed as restrictions upon national action and whatever was necessary in civil law within each several state was provided for by the separate state constitutions. Our attention therefore will be withheld from national political institutions, and indeed from state political institutions to a great degree. Civil law cannot be understood apart from the popular life in the individual states. American civil law, in other words, is of local, not general nature; it comes from the primeval State and not from the historical Federal Constitution. Unlike political law the civil is natural rather than artificial, a plant rather than an artifact.

It is this union of national and local life which constitutes at once the beauty and the difficulty of American law. We have seen the difficulty of finding a real Common Law, because of the differing customs of England, and then of the varying necessities of the colonies, growing out of climate and geographical conditions. Nevertheless it was even more possible in the colonies to speak of a Common Law than it was in England of the time of Blackstone. And it is a tribute to Blackstone himself that this community of law was accomplished in America; for his comentaries, published in 1765, became not only a text book in America as well as in England, but were the basis upon which law was built in later times. From the time of the Revolution lawyers as a class began to assume a higher rank, to take the leading part which they have ever since maintained in America, and it was English reports and Blackstone's Commentaries upon which they were nurtured. It is true that they discarded the political part as unsuited to American conditions, and, living as Blackstone did before the time of true historical investigation, he implanted in legal literature, perhaps even more in America than in England, many positive errors as to the origin of English law. Nevertheless, it was a great thing to have some guide, and particularly one whose style made law attractive. Blackstone played the part in democratic America which Justinian did in imperial Constantinople. To the supremacy of law which he taught must be added, however, the principles of Commercial Law and the rules as to Torts which were in process of evolution in his day; and to these America was to be no mean contributor. The English author had no legislative standing, but he influenced public opinion as strongly as if he had.

Although private law had its origin and protection in the several states, it is remarkable how great an influence the Federal authority exercised in the new commonwealths. It was the first Continental Congress that claimed for all Americans the Common Law as an English heritage; it was a late Congress under the decaying Confederation which established beyond the Ohio rules of legal development for

the states of the future. Jefferson in 1784 drew resolutions for the government of this territory just ceded by Virginia and the other States, but they rewritten three years later by Daue of Connecticut.

This Ordinance for the Northwest Territory passed in 1787 was perhaps extra-constitutional, if not unconstitutional, in providing for the admission of new states, but it was the exercise of a power conferred upon Congress in the deeds of cession by Virginia and the other states and acquiesced in without question. When the Federal Constitution was adopted there was included a power to rgulate the territory of the United States, but no attmpt was made to change the Great Ordinance. This was a **fait accompli,** and might almost be said to be an integral part of the Constitution itself.

The provisions of the Ordinance related not only to the form of government of the new community, but showed a breadth of statesmanship seldom equalled. The very second section provided a simple code of private law which controlled the territory and the states made from it, and by extension later influenced the territories which were created in the greater West beyond the Mississippi River. The laws which were published by the governor and judges, and afterwards by the legislatures of the territories as they were created, were rather an expansion than a change of the principles of the Ordinance. Politically it was to be held by the Supreme Court that when a state was admitted it was admitted upon an equality with the older states and to that extent the Ordinance must be considered as repealed by the act of admission; nevertheless the principles of private law in this second section and in the articles of compact at the end remained unaltered. The articles, for instance, provided for freedom of worship, the right of habeas corpus, and the other provisions which have become parts of every Bill of Rights. One of the most remarkable was that no law could be made which should in any manner interfere with private contracts; for this was immediately adopted into the new Federal Constitution and is the basis of the inviolability of contracts in America.

The Ordinance of 1787 contained a remarkable provision which was absent from Jefferson's draft, and which shows a temporary unanimity of thought on the subject of slavery which was afterwards to be lost. Thus, in words which were to become a part of the national Constitution only after the greatest civil war of all time, it was provided that within the Northwest Territory "There shall be neither slavery not involuntary servitude otherwise than in the punishment of crimes, whereof the party shall have been duly convicted," and there was also added a provision for the rendition of fugitive slaves which was to give great trouble in its enforcement in later days. The Ordinance superseded and repealed the resolutions of 1784 and was itself the mother of constitutions.

In the second section of the Ordinance private property was fully recognized and it was provided that real estate should be conveyed by lease and release or bargain and sale,—thus going back at once to the Statute of Uses,—that these deeds should be signed, sealed and delivered by an owner of full age, attested by two witnesses, and acknowledged or proved and recorded within one year. This settled for all time the simple nature of conveyances and publicity of their record. Nothing was said about contracts except as to their inviolability, and torts received even less attention. Nor was any provision thought necessary as to marriage, and none as to divorce. These both followed the course of the Common Law. As to property of decedents, however, there was a new system, or rather a simplification of the Old Common Law. The estates of persons, whether resident or non-resident, dying intestate, should descend to and be distributed among their children and descendants in equal parts, regardless of age and sex. The descendants of a deceased child were to take the share of their ancestor in equal parts also. Should there be no descendants of the decedent, then the property went in equal parts to the next of kin in the same degree. When it came to collaterals, however, the rule was different; the children of a deceased brother or sister of the intestate were to have in equal parts the share of their deceased parent. There was to be no

distinction between kindred of the whole or half blood. The widow was protected by having for life dower in one third part of the real estate of her husband, and having one third part absolutely of his personal estate; for the general rules of inheritance were the same whether applied to realty or personalty. Wills were fully recognized, both as to realty and personalty, and were to be in writing, signed and sealed by the testator, who must be of full age, and attested by three witnesses. The wills, however, were not valid until duly proved before a court and recorded. Herein was a departure from the English rule, under which the control of estates of decedents and of their wills had been left to the ecclesiastical courts. It is true that from the Reformation these courts were ecclesiastical only in name and in point of fact had been generally administered by the same judges who administered admiralty law. This inconsistency on the part of the courts of England had not been retained in the colonies generally and was changed in the new states. As a rule, there was a court of probate and orphans' business specially designed to look after that branch of law.

Even at this early date the United States came in contact with foreign law, for at Kaskakia, St. Vincent and other villages within the Northwest Territory there were still French and Canadian inhabitants, who claimed to be citizens of Virginia; the Ordinance now continued their laws and customs as to descent and conveyance of property. This was not consistent with the establishment of one uniform system of law, and was only personal and temporary in its application. Their descendant held under the new system.

Such, then, was the new and simple scheme instituted by the Congress of the Confederation in regard to the territory northwest of the River Ohio. And there grew up the great states of Ohio, Indiana, Illinois, Michigan and Wisconsin, beginning with the admission of Ohio in 1802. The system was suited to the conditions of the pioneers, and was ultimately to become the rule for all new states. And the Ordinance had another influence which must not

be overlooked. As the West grw, it came to react upon the older states of the Atlantic coast, and not a few of the reforms which have been accomplished in the East had their origin in laws and influence coming from the West, built up under the great Ordinance drawn by Dane of Connecticut.

XX

DEMOCRACY

When I came to the bench there were no reports or State precedents.—Chancellor Kent.

Authorities: A. De Tocqueville, Democracy in America. James Bryce, American Commonwealth. Roscoe Pound, Spirit of the Common Law. C. D. Wright, Indusrial Evolution of the United States. Simeon E. Baldwin, Private Corporations (Yale Bicentennial), Modern Political Institutions. Livingston vs. Lynch, 4 Johnson Chancery, 573. Dartmouth College vs. Woodward, 4 Wheaton, 518. Commonwealth vs. Arrison, 15 Sergeant & Rawle 131.

The history of the United States from the formation of the Constitution until the Civil War is much more interesting on the industrial than the political side. In politics it consisted of the gradual growth of friction between the free states and the slave, particularly as to the common territories. This somewhat influenced political law, but did not touch Civil Law. On the other hand the industrial growth, particularly in the North and growing West, affected law in all its branches.

The background must not be overlooked. The acquisition of Louisiana practically doubled the domain of the Union and carried it at Oregon to the Pacific Ocean, while the purchase of Florida shortly afterwards completed the natural boundaries on the south. This territory was all of great value for agriculture, while on the other hand shipbuilding and commerce naturally continued to expand on the Atlantic coast. Besides agriculture and commerce, however, the third and equally important mainstay of the country was found in manufactures. The adoption of the Constitution came at the same time with the origin of New England mills and factories, and afterwards the invention of railroad and the opening of coal mines began to make accessible the western domain which Jefferson thought would be a thousand years in developing. The privations of the Revolutionary War and the War of 1812 had made the Americans inventive, for it is a curious fact that hard times bring increase of inventions.

Other things contributed, but the determining factor in American development was what has been called the Advance of the Frontier. Beginning with the settlements at Jamestown and Plymouth Rock, the colonists built their homes ever further and further to the west, cultivating with the hoe in one hand and the rifle in the other, ever treating the Indian as an enemy. Men and women bringing up families in the wilderness, each household, separated from neighbors perhaps by miles of forest, tended to develop a self-reliance and ultimately an individualism unequalled el-

sewhere on the globe. It was not a cultured civilization. Politeness was lacking, but a spirit of helpfulness prevailed, for every one needed help in turn. There was little reading except of the Bible and sometimes of a few English classics. Some men, like Daniel Boone, could not bear to live near others and kept moving with the frontier, but as a rule villages and towns took the place of pioneer forts, and the country gradually became civilized. The process kept on, decade after decade, until the Indian was passed on the way and hemmed in reservations, and the Pacific was reached, to prove the American Terminus until our own day. Whatever may be said of the method pursued, —and pursued instinctively, in the old Anglo-Saxon opportunist fashion of one step at a time, without a definite plan, —there were at least definite results, and the most important of these was to add to the old Saxon type features of individualism which were to remain after the Indian frontier had become only a matter of history.

There were many Indian treaties and the final removal of the aborigines in the thirties threw open much territory only nominally American before; and the admission of new states was the barometer which showed civic development towards the west. This was essentially agricultural, for agriculture must come before manufactures and commerce. During all this time the cities, while increasing in number and size, were still small, lacking the public utilities now so common, and the bulk of the country's population was rural.

The type of government for each of these new states was practically the same as in the older ones, although perhaps simpler in construction. Each had governor, legislature and judiciary. The early tendency towards individualism shown in predominence of the jury resulted by the forties in making the judiciary elective. One step in making public affairs more democratic was that fixing an age limit for judges. Thus Chancellor Kent, after the valuable experience as judge, was removed from the bench; but it resulted in making him even more serviceable as a teacher of jurisprudence. The natural expansion of

law to meet the natural expansion of business, however, resulted in the development of Equity in some states. New York, for instance, continued along the line marked out by Kent even after her chancery court as such was abolished. New Jersey and Tennessee were among the states which preserved a separate equity system, and, where chancery was not maintained as a separate court, equitable principles nevertheless held their ground, as in such great states as Massachusetts and Pennsylvania. A separate court of Equity, although held by the same judges, had been required by the Federal Constitution, and so remained a separate institution, and with the Federal courts became familiar in every state of the Union.

In private life the effect of the Puritan principles as to contract, of the French Revolution and more particularly of the Democracy begun by the election of Jefferson showed itself in law as well as in industry. The Americans had become individualists, and American progress in all directions was individualist. The wheel had come full circle; little or no trace remained of the original Anglo-Saxon group system. The natural family group of father, mother and children of course could not be changed, and the protection of married women's property was always a problem to be worked at. But almost every family was sooner or later broken up by emigration or other causes and it was the individual man or woman who became the political and social unit everywhere. The law of persons became ever simpler, for the control of the parent absolutely ceased at twenty-one, and the old relation of master and servant in its different ramifications became less and less prominent except in business relations. There, however, it found a new development. Dean Pound may be in error in attributing American individuality to the Puritan of New England, for the same spirit was equally prominent in the South and the new States of the Southwest. The independence of the individual which had been introduced by Wycliffe into the English character from his studies of the Bible became an English, not a sectional characteristic, developed more and more by the Advance of the Frontier. But there was a

growth in the law of torts which would seem to be due to New England, the home of manufactures; and that is in the double doctrine of fellow servant and of assumption of risk. The New England view of the importance of the individual was such that he was conceived as a free man at all times, even when he accepted employment in a factory. If the time should come in the development of manufactures when he ceased to be a free man and was little more than a link in the machinery, a cog in a wheel, modifications might be necessary, but at the formative period the rule of fellow servant and assumption of risk became a part of American law and was to prove difficult to remove.

The acquisitions of territory and the American individualism gave rise to a new treatment of the public lands, unique in history. They were not sold to speculators but, following the experiment in the North West Territory, surveyed, quite in Roman fashion, into convenient square sections and sold on nominal terms to actual settlers; indeed, ultimately there came a Homestead Law which practically eliminiated the matter of money altogether. The amibition of every one was to own his own home, and Horace Greeley only crystallized the popular desire when he uttered his famous saying, "Go west, young man!"

There came with all this a strange but most useful growth of legal combination in the midst of the universal individualism. The growth of business caused an accumulation of capital in the East which was invested in the West and Southwest and ultimately all over the country. The time came when steamship enterprises, for instance, grew to be too large for control by individuals, even if those individuals were men like Stephen Girard. Land communication became increasingly important, and turnpikes and canals, as well as river steamboats, called for variation of old business methods. Even partnerships were inadequate to meet the conditions, and there came about a new group system in which men united for business purposes.

In Blackstone's Commentaries, written at the beginning of the Industrial Revolution in England, the subject of Corporations occupies a small place and is almost con-

fined to political and ecclesiastical matters. Even insurance, which became so important a business in England, long remained, as in the shape of Lloyd's, associative rather than corporate. It was in America, and in the expanding needs of a new country that the Law of Corporations really began its wonderful course about the same time as the Federal Constitution. The Federal courts declared them to be persons, subject to special conditions in a state other than that of their creation, and their charters more strictly construed than in England. Perhaps beginning with banks and transportation companies, this form of association gradually became of the greatest importance. At first a corporation was created by the state legislature, but after the Dartmouth College Case, the Magna Charta for corporations, its charter was not amendable except by consent.

The advantage of association of small capitals into a great corporate capital, the absence of personal liability beyond the amount of stock contributed, the opportunities for investment by people who were saving, the possibility of direction by a few enterprising men,—all contributed to cause corporations not only to supersede individual enterprise, but even partnership undertakings. It is true that there were disadvantages also. What were called "wildcat" enterprises of all kinds were undertaken, especially in banking and after the Mexican War in mining; but the advantages were deemed to outweigh the disadvantages, and the Law of Corporations became one of the principal titles of every body of law. The Common Law had a new division added to its table of contents.

There can be no doubt that corporations aided the development of the country and brought results which would have been impossible to individual enterprise. And this was accentuated by the results of the Mexican War in the forties and fifties, which not only added a vast extent to the public domain, but squared off the western frontier of the United States and claimed the Pacific Ocean for its enterprise. There was only wanting adequate communication between the east and the west; for the emigrant wagons and pioneer trails, even reinforced by the sailing

and then steamship navigation around South America, hardly made the Union such except in name. It would require other conditions and a greater development even than that brought by the discovery of gold in California to unite the Atlantic and the Pacific. But it was planned, and that by John C. Calhoun, who is now generally remembered in a very different connection. A Pacific Railroad was not only a possibility, but was begun and was to be effected ultimately by corporate enterprise, aided by grants of public lands from the general government. The usefulness of corporations was to be best exhibited, after many attempts and many failures, in this one enterprise, and in the railroad development which grew out of it through connecting and competing railways north and south. Before the Civil War, however, it was little more than an aspiration, although gradually becoming more and more definite.

There was another side of corporate life which was providentially veiled for the present. How the growth of corporations could result in the accumulation of power, in the super-corporations for which no other name than the old Common Law "Trust" could be found, and the effect upon public and private life of such accumulations of wealth,—all this could not be foreseen. Strange it is that the other side of Individualism is the Corporation, that the associative power of humanity was to show itself not less in the most individualistic country and in the latest civilization on the globe than in the earliest days when natural ties drw men together. If it is not good for man to be alone and from this has grown up family life and all the ties and beauties connected with it, not less true is it that man cannot conduct business as an individual, and that the development of the Corporations grows inevitably out of the development of Individualism.

XXI

CODIFICATION

It is of much importance in practice that the whole law be digested in order, into divisions and titles to which every one may recur suddenly as occasion shall be given as a storehouse furnished for present use.—Lord Bacon.

Authorities: Code Napoleon. Civil Code of Louisiana. Great American Lawyers,—David Dudley Field. New York Code of Civil Procedure. California Codes. J. C. Carter, Proposed Codification of Our Common Law. Amunategui, Vida de Andrés Bello. Código Civil de Chile.

The Common Law has never lent itself to system. It is quite true that under the Anglo-Saxons there were so-called codes, but they were fragmentary at best and borrowed their name from the Roman codes of Justinian and others. The English legislation has always been directed to pressing needs, and has not gone beyond them. The result no doubt has been confusing and this was even more apparent in America after the colonal legislatures added their quotas. Perhaps the more progressive, not to say aggresive, nature of the Americans led to the definite attempts at codification which we find in the middle of the nineteenth century.

Codification, however, even in America goes back to Latin sources. In Louisiana there was adopted in 1825 a Civil Code which has in many respects been a model for subsequent work of the kind. In that state was the frontier between the Latin and Saxon civilizations, and even as to the Latin there was the conflict of French and Spanish. Nevertheless the genius of Edward Livingston, one of the immigrants from New York, solved the problem and produced the Louisiana Civil Code, still in force with minor variations. French law in Louisiana had originally been the Coutume de Paris, with some modifications imposed by Louis XIV. The political law had been changed by the Spaniards, but that in turn was changed by the Americans. The Code Napoleon of 1804 had not been applicable in Louisiana because of the previous cession to the United States, but nevertheless it furnished the inspiration to Livingston, who adopted not a few of its principles. To understand codification even in the United States, therefore, one must understand the Code Napoleon.

The Code Napoleon was the first codification which absolutely distinguished private from public law. It was indeed originally known as the Code Civile at its adoption in 1804 and three years later came to embrace the name of the great man who presided over its compilation. Na-

poleon himself wrote only a few sections, such as those on soldiers, aliens, and divorce, but no one can doubt that his master mind had a great deal to do with harmonizing in one system the customary law of the north and the written law of Roman origin of the south. These two, the **Droit Coutumier** and the **Droit Ecrit**, had been contending for maestry in France from the beginning. The one was Teutonic, the other Roman, with emphasis placed by the kings through their **Ordonnances** upon the Roman element, and quite as firm, even if silent, resistance on the part of the people in favor of the local customs, which in some respects go back to the origin of the race. There were really five codes adopted between the years 1804 and 1810 by Napoleon, but it was the first, the civil division, which bore his name; the others, as successively promulgated, related to civil procedure, commerce, criminal procedure, and crimes. The subject of codification had been under consideration from the very beginning of the French Revolution and Cambaceres had made drafts of codes; but it was not until the Battle of Marengo, which made Napoleon supreme, that the conqueror of Europe undertook codification in earnest. He placed the great civilian Portalis at the head of the commission and worked with them. The Civil Code produced differed vastly from the Roman model of Justinian. The latter was more a compilation of previous statutes,—a kind of revised statutes in one volume, —than like Napoleon's work, a code of principles.

Napoleon was to say that he would go down to history with his code in his hand, and true it was that as he conquered Europe he imposed the Civil Code. Even more remarkable was it, as was said by the German Bluntschli, that despite Napoleon's fall these different nations, from Italy to Holland, retained the code because of its excellencies. There came a reaction in Germany under the influence of Savigny, who contended that our age is not one suited for codification. He pointed out defects, which have perhaps proved to be advantages instead. Spain, however, and its colonies were never subject to the new codification, although when a Spanish code finally came

to be adopted in 1889 it, like every other continental code, was largely influenced by the work of Napoleon. The Code Napoleon consists of 2281 sections divided into three unequal books. The first book relates to persons and in particular to husband and wife, divorce, guardianship and the like. The second relates to property and covers absolute ownership, usufruct, and servitudes. The third is much longer. It is entitled Different Modes of Acquiring Property, and covers such diverse subjects as succession, marriage rights, contracts, implied contracts, torts, and even at the end prescription, much the same as the English Statute of Limitation.

It was left for David Dudley Field to accomplish codification in New York and indirectly in a number of other states. He devoted his life to the work and in the reforms of constitution and laws in 1848 he succeeded in having placed upon the statute books a Code of Civil Procedure. This was designed to be not merely a simplification of the Common Law pleading and practice, but a change of its basic principles, at least in part. Instead of the long continued pleadings, beginning with complaint, demurrer and plea, this endeavored to embrace all matters in dispute in one complaint or petition, containing all causes of action, to which there could be a demurrer or answer, and if necessary a cross complaint and the like. It aimed especially at having as parties the real persons in interest, and at not only eliminating all forms and useless phraseology, but to state in these pleadings the ultimate facts of a case. As to the success of the effort, there is difference of opinion; Pomeroy at least thinks that the reform has been radical and complete.

At all events, the code was directly copied in the new western states, and indirectly modified not only the old western states on the Ohio, but the more conservative southern ones. Alabama, for instance, in 1852 adopted what was called one code but embracing books treating separately of political, civil and criminal subjects, besides procedure by certain fixed forms, supposedly developing the ultimate facts of a case.

It is true that Field was unsuccessful in securing the passage of his Civil Code in New York, but it was adopted in California and other Pacific states and it was the basis of the Civil Code which was ultimately adopted in New York itself. This as finally enacted was largely the work of James C. Carter, the lifelong opponent of Field. It may be questioned whether it was more successful than the Field draft, but at all events the work owed its inspiration at least to David Dudley Field.

The French Revolution of 1848 led to reform movements outside of France, and in neighboring Spain was the draft of a Civil Code, much like the French, but it was not adopted. Four years later came the remarkable work of Andrés Bello in Chile. This divided Napoleon's third book into Successions and Contracts, so as to have four books. It was the model for South American codification for years to come.

Such peaceful reforms had in the United States to pause during the fierce civil dissension of the Civil War and Reconstruction, but this great revolution itself brought so many changes that in the end codification was all the more necessary. Perhaps the most striking of these efforts was what is known as the Revised Statutes of the United States, first issued in 1873. As revised by George S. Boutwell, commissioner in 1878, the Revised Statutes is divided into 74 titles of unequal length and importance, but bringing together in compact form the substance of the Statutes at Large of the United States from 1789 up to that time. This compilation relates mainly to the government, its departments and institutions, as well as citizenship and its rights; but it is remarkable how far its provisions affect the life of the whole country, and the growing tendency is towards amplifying rather than decreasing the national legislation. Several of the titles have become separate codes. Thus, the Bankruptcy Act of 1867 was repealed and afterwards the present more effective act of 1898 was enacted, affecting every state and the business interest of the whole Union. Crimes are likewise a separate subject of great and increasing importance, con-

nected on the one side with the title on the Judiciary, which itself developed into a Judicial Code in 1911. This subject, however, whether as title or code, does not embrace that of Procedure, for the practice of the several state is followed in the Federal courts sitting in them. Even this, however, is **sub judice** and will probably be changed, as a comprehensive law on the subject has been before Congress for several sessions. The Revised Statutes, especially as themselves revised in 1881, make up a national codification of great value.

About the same time in England came in 1875 the consolidation of the old historic courts of King's Bench, Common Pleas and Exchequer into one great High Court of Justice, embracing also the old Chancery, Admiralty and other tribunals. This by no means meant the abolition of Equity: on the contrary Equity might be said to have absorbed Common Law; for it was provided that while procedure was simplified,—much along the lines of the Field codification,—equitable principles should prevail wherever there was any difference or conflict between the two old systems. The reform of procedure did not lead to a Civil Code; nevertheless, during the reign of Victoria there was great advance towards unification in British legislation. Some one has sarcastically said that the custom has arisen of adopting a law book by act of Parliament. At all events there have been valuable acts passed which amount to subordinate codes. Thus, the Negotiable Instruments law and the Workmen's Compensation Act are of this nature.

Still, the rule remains that codification is not an Anglo-Saxon tendency. The Anglo-American law is opportunist, even if it has been better digested and made more simple in expression. And it would be interesting to seek the source of this distinction between the Latin and Saxon races. Perhaps it may be found in one distinguishing difference between the two civilizations. The Latins passed through the same stages of development as the Anglo-Saxons, and it was after they lost their legal initiative that great emperors like Theodosius and Justinian in ancient

times and Napoleon in modern times put their laws into systematic codes. And this was due to the fact that the Roman Empire had really become essentially Greek from its translation to Constantinople. It was the Greek love of form and beauty which brought about this change, and the modern Latins have been rather Greek than Roman in their character. Beauty dominates their civilization from heart to circumference. On the other hand, the Teutons pay less regard to form and more to substance. They have less love of beauty, whether of form or expression, but are perhaps still in a more vigorous stage of growth.

XXII

LEGAL RECONSTRUCTION

Private rights must be determined on the theory that a state cannot perish. With political relations the case is different.—Edward Dunning.

Authorities: McPherson, Reconstruction. U. S. Statutes at Large. T. R. R. Cobb, Inquiry into the Law of Negro Slavery. The Slaughter House Cases, 16 Wallace 36. The Civil Rights Cases, 109 U. S. 3. Peter J. Hamilton, The Era of Reconstruction, (History of N. America series.)

The American Civil War drew a broad red line across the history of the country. In many respects the United States was different after the War from what it was before. It is true that this was particularly evident in the South, on account of the wastage of war and the abolition of slavery; but the change in industrial methods, especially as connected with the growth of railroads and the development of the far West, made a marked difference north of Mason and Dixon's line also.

The Mexican War had not only added California and its wealth, but largely increased the public domain and had drawn much of the population west of the Mississippi River, even to the Pacific. These new commonwealths differed from the old in greater individual development, and indeed individualism had now become the essential basis of all America. Slavery in the South caused the retention in that section of more aristocratic features, and the Civil War was necessary to bring a change. With the political and even military sides of that conflict we are not at present concerned. It had been supposed that the Compromise of 1850,—almost the last work of Henry Clay,—would permanently adjust sectional disputes, but, as Mr. Seward declared, the conflict was irrepressible. Such events as Mrs. Stowe's book Uncle Tom's Cabin on the one side and Chief Justice Taney's decision in the Dred Scott case on the other added fuel to the flame, which upon the election of Mr. Lincoln, an abolitionist, burst out in civil war. The Southern States aimed to make slavery the corner stone of their civilization; the North determined to force them back into the Union, and events led up to emancipation as a war policy. The superior size and strength of the North enabled it in 1863 to cut the Confederacy in two by opening the Mississippi at Vicksburg, and Sherman's March to the Sea the next year practically cut Lee off in Virginia from his source of supplies in the central South.

The surrender of Lee and Johnstone ended the military

struggle, but unfortunately the assassination of Lincoln and the injudicious activity of his successor Johnson prevented the political rehabilitation of the Southern States. These had readily enough adopted the XIII Amendment, abolishing slavery, but radical leaders under Stevens and Sumner determined upon the reconstruction of the whole South and its institutions by means of the military. The negroes were given the ballot and the Confederates were deprived of it. Chaos reigned supreme until the whites regained control of many of their state governments in 1874, and two years later, after the contested presidential election, South Carolina, Mississippi and Louisiana also came under the old control, and the national government removed its hands from local affairs.

The XV Amendment as to the ballot was to prove ineffective, but the XIV adopted in 1868 made a marked change in not only national but state institutions. As construed by the Supreme Court, it did not go as far as its projectors desired, but it placed the rights of American citizens as such under the control of the United States and the Federal courts and restrained state governments and courts. Moreover, during negro domination and afterwards during enlightened white leadership many new laws were passed and social conditions grew up which created in the New South a greater tendency towards individualism than had ever before prevailed. The national government was stronger and national legislation played a greater part in American development; but from the time of the Slaughter House cases each State was and is secure in its control over civil law and private interests in all the divisions with which we have become familiar.

As to persons, of course the greatest change was the abolition of slavery. The Southern States had aimed at the passage of laws suited to a transition state, when the late masters were still to exercise control over the freedmen, not unlike the clientage of the Romans. But affairs moved too rapidly for transition measures and indeed it was this attempt which brought the Reconstruction Acts. The negro was given full equality of rights with his late master before

the law. For a time his contracts were controlled by the Freedmen's Bureau, a semi-military institution, which probably did as much harm as it did good, but ultimately when the troops were withdrawn the two races were left to adjust themselves as best they could. It was a long and painful process, but generally guided by common sense. The restless negroes were drained off to the towns, where new conditions growing out of the development of commerce, manufactures and mining industries gave them employment and aided in the evolution of the country. The quieter negroes remained on the plantations.

While in the South there was no marked change in family law so far as the whites were concerned, there was now opportunity, not always embraced, for the negroes to develop home institutions and more settled marital relations. This was as much a missionary as a legal work, however, and white influence was for a long time paralyzed by political conditions. Intermarriage of whites and blacks was not only frowned on, but illegal, and seldon needed any interference of the law. There was an instinctive feeling among the whites which looked to the preservation of the purity of the Caucasian, and it has until now controlled every Southern feeling and institution. With this, however, goes and must go the absolute equality of treatment to the negroes within their own ranks and limits. To Reconstruction days, for instance, may be attributed the public school system, which had its origin in New England and hardly flourished in the antebellum South, where private schools were the rule. Since the War, however, much has been done and there is hardly a neighborhood which has not access to public schools. These are separate for each race, and separation, as Mr. Cleveland declared, is for the good of both races. Bolivar's doctrine of mixture of dissimilar stocks has largely prevailed in Latin-America, but in the United States the purity and leadership of the white race is fundamental.

It is in connection with property that the legal reconstruction most shows itself. Before the War not only did slavery draw its bar sinister between the two races, but the

social cleavage was distinct between the plantation owner and the whites, who, not owning slaves, were forced to less desirable lands, frequently in mountain districts. After the War the poor whites assumed a much more prominent position and indeed not a few of them became Southern leaders. Their repulsion towards the negroes was greater than that of the planters, who were more used to them. A result on the property side was that the great planters gradually lost their holdings, either from inability to get or control labor, or for other reasons, while the poor whites in their turn became more prosperous. The negroes, too, from being landless, have become to a large extent a land-owning class. An interesting and promising development is found in the activity of many of that race to obtain homes, whether in town or country. There are some sections of the South where the whites have almost moved away to the towns and the country is dotted with little cabins and patches of corn and cotton, so that a foreigner would say that it was the land of a black tenantry. Not that the production of such staple crops as corn and cotton has retrograded; only the methods of cultivation and handling have changed. The amount and value of all crops has been greater since the Civil War than before.

All over the Union, and at the South not less than elsewhere, the national domain has helped this development of small land holding. The Homestead Law in all parts of the country has aided this form of individualism, and the country is as a whole the richer for it. What in France needed a revolution, and in England has not yet been accomplished, has resulted in the United States not so much from the Civil War itself as from the wise provisions of pre-emption and especially Homestead laws passed by the United States in regard to the public domain. This has been regarded not so much as a public trust, to be handled and farmed for the public good, as the source of homes and industry for the individual citizen and his family. Perhaps going with this and growing out of it is the tendency, which has indeed existed ever since Magna Charta, of exempting necessary property from execution

for debt, until now the homestead, tools and perhaps too large an amount of personal property is exempt from such seizure. Sometimes this impairs credit itself by making a dishonest debtor practically independent of his creditors; nevertheless the object and on the whole the result of this policy is the protection and encouragement of individual energy and effort, to the great advantage of the public in general.

The growth of wealth connected with the development of railroads, mining, manufacturing, commerce and all other forms of industry which is so marked a feature of American life since the Civil War has led a vast increase in the nature and extent of the Law of Contract. It is true that the Law of Torts has also grown, for the contact of man with man is as apparent on the side of wrong-doing as of agreement. Negligence in particular is proving a fertile title of the law, and fraud still illustrates the dictum of the English chancellors that definition is dangerous; for neither law nor equity can keep up with the ingenuity of the dishonest. Nevertheless, it is in the vast expansion of contract that we best see the growth of American civilization and realize how far modern conditions have brought a development from that old Anglo-Saxon time when the only relation of man outside of his immediate group was one of force. Sir Henry Maine said that legal evolution was from **status** to contract, from the rule which governed the relation of man and man in the gens to that which governed him in the relation of buyer and seller and the like. And in Feudalism, the basis of English land law, **status** assumed a new but as controlling a form in the relation of lord and tenant; a man was born into his **status** and practically could not change it. There has been a gradual evolution from this to individualism. All that is true, but it is only half the truth. There is a shifting of gravity from **status** to contract, but there is an evolution at the same time of both **status** and contract. Contract has assumed a more prominent position in law than formerly, but the relations growing out of the family and new groups have never been more accentuated than in modern

times. Some things have been freed from group control, but this has made all the more necessary the definition and protection of what remains or has newly developed.

While the Civil War, therefore, cannot be said to have altered the basis of American legal life, it has accentuated features of equality, particularly so in that part of America, which, on account of negro slavery, was more conservative and in some respects more aristocratic; but the object of all law is to enable the individual to put forth his best effort in the social order and the reconstruction which has grown out of the American Civil War has tended in this direction. Legal development has merely kept pace with social changes. To English liberty, accentuated by American conditions into individualism, is being added equality. New questions have arisen growing out of the modern relation of employer and employee, others out of the relation of America towards people in new possessions, others out of class relations much more like **status** than contract. Equality in many directions has not been fully attained but it is the goal, the conscious goal; and America presses forward toward that mark.

XXIII

THE SUPREME COURT OF THE UNITED STATES

What is the Supreme Court of the United States? It is the august representative of the wisdom, justice and conscience of this whole people in the exposition of their constitution and laws.—Horace Binney.

Authorities —H. L. Carson, History of the Supreme Court U. S. H. Flanders, Lives of the Chief Justices. Chisholm vs. Georgia, 2 Dallas, 419 (1793). Marbury vs. Madison, 1 Cranch, 45 (1801). Fletcher vs. Peck, 6 Cranch, 87 (1810). United States vs. Hudson, 7 Cranch, 32. The Nereide, 9 Cranch, 389 (1815). Martin vs. Hunter, 1 Wheaton, 304 (1816). Cohens vs. Virginia, 6 Wheaton, 264 (1821). Mc Cullough vs. Maryland, 4 Wheaton, 316 (1819). Dartmouth College vs. Woodward, 4 Wheaton, 518 (1819). Sturgis vs. Crowninshield, 4 Wheaton, 122 (1819). Osborn vs. The Bank, 9 Wheaton, 739 (1824). Gibbons vs. Ogden, 9 Wheaton 1, (1824). Brown vs. Maryland, 12 Wheaton, 419 (1827). Cherokee Nation vs. Georgia, 5 Peters, 1 (1831). Charles River Bridge Case, 11 Peters, 420 (1837). Passenger Cases, 7 Howard, 283 (1849). Genesee Chief, 12 Howard, 443 (1851). Cooley vs. Wardens, 12 Howard, 299. Dred Scott vs. Sandford, 19 Howard, 393 (1856). Vidal vs. Girard, 2 Howard, 127 (1844). Ex parte Vallandigham, 1 Wallace, 243 (1863). Mrs. Alexander's Cotton, 2 Wallace, 404. Texas vs.

White, 7 Wallace, 700 (1868). Ex parte Garland, 4 Wallaee, 277 (1866). Railroad vs. Lockwood, 17 Wallace, 357 (1873). Crandall vs. Nevada, 6 Wallace, 35. Osborne vs. Mobile, 16 Wallace, 479 (1872). Paul vs. Virginia, 8 Wallace, 168 (1868). Hepburn vs. Griswold, 8 Wallace, 603 (1869). Civil Rights Cases, 109 U. S., 3 (1883.) Chinese Exelusion Case, 130 U. S. 581 (1889). Granger Cases, 94 U. S., 113 (1876). Railroad Commission Cases, 116 U. S., 307 (1886). Original Package Case, 5 Howard, 504. Re Neagle, 135 U. S., 1 (1890). Mormon Church vs. U. S., 136 U. S., 2 (1889). Re Debs, 158 U. S., 564 (1894). Income Tax Case, 157 U. S., 429 (1894). Insular Cases, 178 U. S., 42 (1899). Ex parte Milligan, 4 Wallace 2.

It is agreed both by Americans and Englishmen that the United States Supreme Court has become the most exalted tribunal in the world, and we cannot better close our consideration of the development of the Anglo-American law than by a study of this institution. It did not promise much at the beginning. It was organized February 2, 1790, in New York City under John Jay as Chief Justice. And as Webster says, when the judicial ermine fell on Jay it touched nothing less spotless than itself. For some time, however, it had little business, and Jay himself later resigned to become governor of New York. Rutledge could scarcely be called Chief Justice, as he was not confirmed, and Ellsworth, although the author of the Judiciary Act of 1789, himself scarcely realized the future of the court. After his resignation he wrote despondingly of the judicial branch of the government. Nevertheless, Chisholm vs. Georgia was an important case and a great step was taken when the court declined to advise Washington upon the law when requested to do so by the President. It laid down the principle, new even in English law, that the judicial jurisdiction was confined to litigated cases arising under the Constitution and laws of the United States.

The real history of the court begins with John Marshall, appointed by President Adams after the success of Jefferson in the elections was beginning to bring about the disintegration of the Federalist Party, which under such leaders as Hamilton had organized the government; and it was under Marshall and Taney that the court assumed the high rank to which it was entitled. Marshall represents the Federal centralizing tendency; Taney the States Rights or local government tendency. Both were needed. Perhaps Marshall was going too far, and at all events the reaction under Taney itself accomplished great things without impairing Marshall's work. For instance, Marshall's great decision in the Dartmouth College case as to the inviolability of a charter granted by the government received a fitting complement, if not modification, in his successor's decision

in the Charles River Bridge case that the police power cannot be granted away. On the other hand, Story's restriction of admiralty jurisdiction to tide water, as in England, was rightly rejected by Taney, who in the case of the Genesee Chief declared it to embrace the Great Lakes, as it already had been declared to apply to rivers, like the Mississippi, navigable in fact.

It was Marshall, however, who laid broad and deep the supremacy of the judiciary in the American system. This came about particularly by enouncing the principle that laws, whether State or Federal, violating the Constitution are void,—and this as a mere interpretation of the provision that the Constitution is the supreme law of the land. It was this which made the Supreme Court the final arbiter of all legal and Constitutional questions, and put it upon its present basis of supremacy. It is true that other courts had already declared the same thing, but it was John Marshall who made it the cornerstone of the government. And this was done against the active opposition of such great presidents as Thomas Jefferson and Andrew Jackson. Indeed, it seems remarkable that the growth of the country should on the historical side have been under these great Democratic leaders, believing in local self-government as the American principle, while at the other end of Pennsylvania Avenue Chief Justice Marshall was enforcing Federalist principles leading to a strong central government. But it is an illustration of the American combination of central and local elements in the State. Neither is complete without the other, however they may misunderstand each other for the time being.

Marshall's work began with Marbury vs. Madison, in which he enunciated the principle as to unconstitutionality of laws and the jurisdiction of Federal courts over all officers of the government, executive or otherwise. It is true that he refused to issue the mandamus prayed to the Secretary of State on the ground that the Supreme Court had no jurisdiction of mandamus. So that Marbury never received from the Secretary of State the commission as Justice of the Peace to which the Supreme Court declared him en-

titled, but the rule was declared and has grown to be the chief stone of the corner. The principle of unconstitutionality was extended to state laws in Fletcher vs. Peck and the right to appeal from a local Supreme Court to the Federal Supreme established in Cohens vs. Virginia; but the limit of Federal control over State matters was regretfully announced in the Cherokee Nation vs. Georgia, when it was declared that the Indian tribes, however mistreated, were not "nations" who could sue in the Supreme Court.

The gradual extension of national power is seen in such cases as McCullough vs. Maryland, where the state was prohibited from taxing Federal agencies, and Gibbons vs. Ogden where interstate commerce was declared free even against the well intentioned act of New York designed to protect the invention of steamboats from invasion by citizens of other states. Such cases established the power of the Supreme Court, and particularly of Chief Justice Marshall, but even Marshall found his influence less stable as Jackson placed new judges with him on the bench, and appears dissenting in a constitutional question in Ogden vs. Saunders.

Other cases than those relating to the Constitution came before the Court, such as the Nereide, where the freedom of goods of a neutral upon an enemy ship was established; but it is in constitutional questions that the court under Marshall was famous. Of over eleven hundred cases in his time Marshall himself decides upwards of five hundred.

Under Taney were also great decisions, and then it was that Story established the law of trusts in this country in the matter of the will of Stephen Girard, for the jurisdiction due to diversity of citizenship takes up private as well as constitutional questions. Perhaps the most famous case of Taney's time was that of Dred Scott, where the Supreme Court undertook to declare as a political principle that the Missouri Compromise was a nullity. This decision of 1856 was resented at the North and did no good to the South in the fierce struggle which was impending. Taney lingered on during the first years of the Civil War, great even in adversity. In the Merryman case he held that the

President could not suspend **habeas corpus**, and, while his decision was disregarded by the executive, it led to the enactment of a law by Congress covering the question for the future.

Through the history of the United States, judicial as well as political, was drawn a broad red line, the Civil War from 1861-65. Chase, who as Secretary of the Treasury had planned the national bank act, proved a great and unexpectedly conservative Chief Justice in the war questions which continued after the close of hostilities. He settled the point of continuous voyages of ships bearing cotton, the contraband nature of cotton within hostile lines, no matter by whom owned, the survival of the states as entities, despite Reconstruction, in Texas vs. White, that an oath forbidding **ex**-Confederates to practice law was **ex-post facto** and could not be exacted, and his crowning decision was adverse to the legal tender quality of the national banknotes which he had himself created. In this, however, he was to be overruled by a decision in the Legal Tender cases rendered by the court with members appointed for the occasion.

Since the Civil War questions arose as to the relation of the seceding states to the Union after the adoption of the XIV Amendment. In this work the leading spirit was Mr. Justice Miller, appointed by President Lincoln from Iowa. It was he who decided the Slaughter House cases, restricting national action to privileges and immunities of a national nature, and leaving undisturbed the old civil rights which had their origins with the states. In the same way the Civil Rights Cases held that while the national government could prevent discrimination by the states it could not itself pass affirmative legislation. The Supreme Court has become not merely the organ of the Federal government in the advance and interpretation of its powers, as under Marshall, but the palladium of the States as well, the final and impartial arbiter of all rights under the Constitution, whether claimed by general or local government, by individual or corporation.

Such points came up even more persistently under

Waite and Fuller as Chief Justices. The first was Republican, the second Democratic, but the advance of national supervision of interstate commerce due to the railroad development begun with the Civil War continued under the one as under the other. The Original Package case, the Granger cases, the Mormon Church case, Re Debs and others carried the national authority to a higher point than had been attained since Marshall, although the Income Tax case declared unconstitutional an act of Congress on that subject. A constitutional amendment, however, has made the decision immaterial.

The Insular Cases of 1901 marked a new judicial trend growing out of the new world condition of the United States since the war with Spain. White was not to become Chief Justice until 1910, but his influence was already manifest. He came to dominate the court much as Marshall had done in earlier days, and his development of the implications of the Constitution, or rather of powers implied in the national government because it is a government,—as in the case over the Adamson law,—mark a new epoch in the history of the United States as well as of the Supreme Court. This is also emphasized by decisions in which Mr. Justice Brandeis has been influential, for a period of socialization in law, temporary or permanent, marks the present; and it is too close to us for proper perspective.

All in all, we find the Supreme Court starting from small beginnings and reaching an unquestioned supremacy, hardly broken by the four years when laws were almost silent. In many respects this great Court may be regarded as the supreme attainment of Anglo-American legal development, whether in political or private law.

XXIV

THE CIVIL LAW vs. THE COMMON LAW

Rome reigns throughout the world by her reason after having ceased to reign by her authority.—D'Aguesseau.

Authorities: Jas. Bryce, Studies in History and Jurisprudence. W. W. Howe, Studies in the Civil Law. A. Marichalar, **Historia de la Legislación**, etc., **de España**. James Kent, Commentaries. **Fuero Juzgo** (English translation by Scott.) Sir Henry Maine, Ancient Law. Reports of Bureau of Ethnology.

We have been studying the origin and growth of the Common Law in England and America, pausing from time to time for purposes of contrast to look at the Civil Law prevailing in France and other continental countries. There have been other bodies of law, there are other bodies of law even now in Asia; but the Civil Law and the Common Law are the two systems which are not only flourishing best at present, but the two systems which seem fated to divide the world between them. Perhaps some day there will come a union of the two in some favored land; for the present at least we can think of them only as different if not opposing systems.

Nevertheless, it is not easy to define their differences. Certain it is that both originated in the Aryan stock and that the early Roman law, from which the Civil Law is derived, presents strong analogies to the primitive Germanic customs from which the Common Law is descended, but from which it has departed in developing Contract instead of Status. The differences are not due so much to difference of race as of surroundings and more particularly of climate. No doubt each system is suited to the races which follow it, although there may be theoretical advantages of one over the other. At all events, let us examine the more striking differences between them.

In doing so we shall eliminate the question of procedure entirely. The Common Law procedure has been very much changed even in its essential features, while on the other hand Civil Law procedure differs in each of the Civil Law countries. Of course crimes are entirely without our scope, and political law does not at present concern us. A prejudice has arisen in Anglo-Saxon countries against the Civil Law because it is declared in the Digest that the will of the prince has the force of law,—a maxim which could not arise among the liberty-loving English. This prejudice, however, is, so far as private rights are concerned, without foundation. The Civil Law prevails in Louisiana, and no one will think of the people of that state as

having less liberty than any other. The Civil Law has been received in Germany, and, whatever may be thought of German methods, nevertheless this reception was by people of the same stock as the Anglo-Saxons and is not at all inconsistent with an admirable body of private law. Perhaps the distinguishing procedural feature lies in the jury, which originated in England; nevertheless, the scope of the jury is being limited in Anglo-Saxon countries, while it has been introduced in many cases throughout the Civil Law world. The real difference is in substantive law.

Taking up, therefore, first the title of Persons, expressed in Roman law by the word **caput**, we find that in Civil Law countries one comes of age at twenty-five, while in Anglo-Saxon countries he comes of age at twenty-one,—and twenty-one has become the rule of Civil Law Porto Rico. Remembering that the Civil Law field is the south of Europe, tropical and South America, we should expect the absolute converse, for naturally the human physique develops more rapidly in warm countries. We should have expected that the majority about the Mediterranean would be 21 and in colder England and the United States would be 25 years of age. Another distinction is that the Civil Law favors partnership to a greater degree than the Common Law. Possibly the most striking form of partnership about the Mediterranean and allied countries is that of **sociedad en comandita**, where one man furnishes a fixed amount of capital and the other is the actual manager. Not that limited partnerships are unknown to the Common Law, but the prevalent form of business association for a century past is that of corporation. This like much else was a Civil Law institution, perhaps going back to the colleges of priests of ancient times; but those after all were brotherhoods, with mutual rights and duties, while the corporation is the acme of individuality. Mankind must associate together, for man is a social being; but the Common Law countries have outgrown association of kindred as such. They have developed individualism to its extreme, and when Saxons associate, as they must, they leave all similarty to the family behind. The corporation is an association in

which there is individual liability only up to a fixed amount, and corporations are probably now accomplishing four-fifth of the business labor of the civilized word; certainly this is true in Common Law countries.

Both systems have outgrown slavery,—itself originally a part of family law,—and both still know agency; but it is under the Civil Law that agency specially prevails as **mandatum** in different forms. To such an extent is this title carried that one might almost say there is no one who attends to his own business; on the other hand, at Common Law, while the agent exists, he acts in the name of the principal and the maxim of **respondeat superior** makes the principal the real party to every transaction. At Civil Law such responsibility is confined to a few definite heads.

The reason for these and many other distinctions probably lies in what we know of the origin of the Family. Bryce tells us that family law is the principal feature of the Civil Law systems. Nevertheless, one of its most striking features, the marital partnership, is quite clearly of Germanic origin. At Rome the wife brought a dowry, **dos** to the husband as her contribution to family expenses, and gradually there grew up the custom of gifts on his part of equal value. Under the Visigothic Fuero Juzgo and the Germanic Coutumes and in modern Civil Law as it developed from them whatever the husband owned before marriage remained his own, and whatever the wife owned before marriage remained her own, with exceptions relating to dower and dowry. On the other hand, what was earned by husband and wife during the existence of the marriage was and is a joint property, divisible at the end of the marriage. This is known in the French law as **acquet**, in the Spanish as **gananciales**. Obviously during a long married life these earnings will be of great value to the parties concerned and they give rise to a considerable body of legal rules.

It may be doubted, however, whether this subject is strictly a branch of partnership law; it contains elements of social duty as well, and is connected at least as much with **status** as it is with contract. Sir Henry Maine teaches that legal progress is from **status** to contract, that is, broad-

ly speaking, from kinship to individualism. This is very largely true at Common Law, but it may be doubted whether it is true at Civil Law, where there has been evolution not so much from one to the other as development of each of them. In Anglo-Saxon countries the family after the children become of age is rather a personal than a legal relation, for migratory instincts and customs have reduced kinship almost to a shadow, dear as kindred may be in special cases. At Civil Law a person bears the name not only of his father, but of his mother, and there may be a shrewd conjecture that this harks back not to a time of matriarchy, but to a time of polygamy far anterior to the Moorish **barraganías**.

Other signs point in the same direction. Thus, there is a marked distinction between the two systems of law in regard to the legitimacy of children. The Civil Code recognizes not only the half kin, as does the Common Law, but also illegitimate kinship, and this not as anything rare, but as something common. There are even a number of kinds of illegitimacy, each carrying a different result; in family settlements in court illegitimate children frequently inherit, although after the legitimate children, with no sense of shame or inferiority.

On the other hand, at Common Law the short and ugly word for an illegitimate child is bastard. In the eye of the law he has no family and is said to be **filius nullius**. The question at once arises in the mind as to whether this is cruelty; it certainly works a hardship upon innocent offspring. On the other hand, the important question also arises as to the good of the community at large as distinguished from that of these children in particular. Does or does not the Civil Law rule amount to favoring illegitimate children? Does it or not tend to encourage illegitimacy? If it does, it tends to break up the sanctity of the family, and under any system of civilized law the family is the basis of society. Perhaps these questions will be answered or at least regarded differently under the two systems of law because of the different points of view of the races involved. There is one curious feature of family life prevalent

under the Civil Law only,—the family council, prominent in the Code Napoleon. Some inklings of this are found in the Roman Digest, but it seems from the **Coutumes** to have had Germanic antecedents. It has been omitted from the Porto Rican version of the Spanish Code, and under the Common Law its functions are provided for by probate or orphans courts. In this connection it should be noted that divorce is not favored in Civil Law countries, while it is one of the crying evils in the American States. It is individualism run mad, preferred in a matter of state importance to state interests themselves. Whether modern Latin literature does not show other means of accomplshing the same egoistic results without formal divorce, however, is a social rather than a legal question.

It would seem then that the underlying distinction between the two systems is the individualism of the Common Law and the importance of kindred in the Civil Law. The same thing appears in the title of Succession. Under the Romans an estate, **hereditas**, remained intact as a **universitas**. Both Gaius and Julian call it **successio in universum**. This was undermined in practice by the use of wills, which was a Roman invention. Nevertheless, the scope of the will of a man having children was always very limited, —in Spain one third of his property,—and to this day a parent cannot deprive children of their share, defined by law, in the estate he leaves. It is even called a **legitime**. On the other hand, the Anglo-Saxons have taken the Latin invention of the will and pushed it to extremes. An American father can totally disinherit any or all of his children and will his property as he desires. In point of fact, however, this is generally obviated by the jury trying the case; for the jury has the right to declare undue influence and thus invalidate an unnatural will. In England they affect entailment by means of trusts either at marriage or otherwise during life time and avoid jury interference.

Taking the further title of Property, we find the same principle running through. In Civil Law countries property is held together to a much greater extent than in the United States. An undivided interest of a tenth or even

a hundredth is not at all uncommon, and passes freely from hand to hand. Cities and other communities have large interests held for the common use of the people, and the paternal character of the state government on the continent of Europe represents the same principle carried into politics. And there is not only such community interest in lands, but the right to use another man's land has received an extension at Civil Law which was unknown in England until the courts intentionally adopted the whole system of Servitudes from the Civil into the Common Law. A more active individual life in England made more important the property which one handles for himself, and there arose the distinction of realty and personalty, which is much less apparent on the continent. The Romans distinguished a farm from other property because originally they constituted a farming community; but they and the legal systems descended from theirs have had almost the same form of conveyance for all classes of property, executed with great formality before a Notary, who is practically a judge representng the public interests.

It is in the title of Obligations that Sohm and others declare the Roman law to have made its greatest contribution to civilization. Obligations embrace Torts as well as Contracts, and the Civil Law says little on the subject of Torts, while it is growing subject in the hands of the common lawyers. Even here the idea of kinship comes to the surface, for at Civil Law from the time of the Romans the standard of care which should be exercised is that of a good father of a family, **paterfamilias**. On the other hand, the standard at Common Law is that of the average man. Practically the two standards are not unlike, but this is because modern conditions are tending to make a good father of a family pretty much the same as the average member of a community; but the term and in some places the practice points back to this kinship feature.

In the same way the Spanish commentator Manresa points out that in the modern codes the Germanic idea of intention finds its place under the head of Contracts. Nevertheless this is an invasion. The Civil Law, built into

shape as it was after the creative period of the Romans had come to an end, is based upon form, and formality is the keynote of Civil Law countries and their civilization. There is no Statute of Frauds in the Civil Law. Everything must be according to certain fixed rules. The phraseology is more accurate than in the Common Law; thus the title Sales is represented by Purchase and Sale. The French have their own words for different forms of contract, but the Spaniards still preserve the Roman terms, sometimes slightly changed. Thus we find **commodatum, depositum, mandato, censo, emphyteusis,** as well as that oldest of all contracts, **antichresis**. **Antichresis** has a Greek form, and is found in the **Corpus Juris** of Justinian as well as in the Code Napoleon, but it flourished, if it did not originate, upon the Euphrates and is preserved on the Babylonian bricks. It is that form of contract by which a lender takes the property of the borrower and holds it until he works out the debt from the profits. It is one of the many indications that debt was originally by no means a personal obligation and is an illustration of the principle pointed out by Holmes that things were the basis of human relations quite as much as persons. The use of collateral, therefore, did not originate with modern banks, for this **vadium vivum** long antedates the **vadium mortuum** which has become shortened into **mortgage**. Antichresis and holding a debtor in jail are almost two forms of the same proceeding.

This is all a reminder of the primeval tendency towards form, a survival of the old love of symbolism, which Herbert Spencer has shown us played so great a part in primitive times. Another phase of it in the Civil Law system is that which attaches privileges or liens to what at Common Law are ordinary debts. At Common Law the debts of a decedent are paid in a certain order, and these priorities are fixed by law. At Civil Law, however, all the debts which a man can owe while living have certain privileges or liens attached to them, each declared by law,—as to this day in the French, Spanish and other codes, with elaborate provisions as to priorities and how to en-

force them. Debts therefore have a status themselves. The Civil Code in its late chapters carries amlost a kind of bankruptcy law. The Common Law tendency has been away from all symbolic acts and priorities except as fixed by contract, or surviving from the necessity of the case in admiralty, which is a system to itself. The freedom of contract is not so much a maxim as the basis of the Common Law.

It was left to another, the Teutonic, stock to continue the individualist development, and in some respects, it is to be feared, to carry it too far. At all events, the Civil Law and the Common Law of our own modern times are the expression on the legal side of the effects of the climate on the peoples concerned. Those about the Mediterranean live in a warmer air and under a brighter sky than those in foggy England and the parts of America colonized from it. The southern peoples are more social, more talkative, more polite, more musical, enjoy life better than those of the north. They see more of nature and that nature is more beautiful. Perhaps one may say that to them Beauty is the predominant thing in life, almost a **summum bonum** and that they deem emotion the way to secure it. The English, on the other hand, have been driven in upon themselves, and the development has been internal, in homes and individual institutions. The South American Rodo thinks that the typical Anglo-Saxon is found in the Puritan, with his sense of duty growing out of this individualism. And this would seem to be true, although there are many exceptions and doubtless some revolts against such a characterization. Beauty makes a smaller appeal to the Saxons and the greatest teachers impress Duty. Doubtless both qualities, Beauty and Duty, exist in each civilization; nevertheless, it may well be that the tendency in the south is toward Beauty, and in the north towards Duty. In the south there is more of formality and finish in law as well as in other features of civilization; in the north there is greater individualism and personal activity. And perhaps here we may find the underlying causes of the difference between the Civil Law and the Common Law.

XXV

SOCIALIZATION IN LAW

Of law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world: all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power.—Richard Hooker.

Authorities:—Roscoe Pound, The Spirit of the Common Law. John Austin, The Province of Jurisprudence. Karl Marx, **Das Kapital**. Henry George, Progress and Poverty. Sherman Anti-Trust Act, July 2, 1890, 26 U. S. Statutes at Large, 209. Clayton Act, October 15, 1914, 38 Statutes at Large, 730. Case of Monopolies, D'Arcy vs. Allein, 11 Coke 84 b. Danbury Hatters, Loewe vs. Lawlor, 208 U. S. 274, 235 U. S. 522. Standard Oil Co. vs. U. S. 221 U. S. 1 (1911) U. S. vs. Harvester Co. 214 Fed. Rep. 987, 248 U. S. 587. U. S. vs. Worrall, 2 Dallas 384. As to Trusts, Commissions, &c., see current legal reviews, such as 35 Harvard Law Review, 223, 816, &c. Duplex Co. vs. Deering, 254 U. S. 441. Wilson vs. New, 243 U. S. 332.

We have now gone through the principal stages traversed by the Common Law of England and America, assisted by legislation. We have seen the beginning in a group system or Gens, already giving way to tribal association based on locality, in which the individual began to play the part denied him under the kinship system. We have traced the different steps by which individualism became the basis of private law, from time to time contrasting it with the group system remaining the foundation of the Civil Law. We have found the Liberty achieved in England developed into Equality in the United States; and we have come to a point where some other phase seems to be apparent in legal development.

This, as Roscoe Pound points out, arises in connection with the growth of the City. A hundred thousand people in the country have very different needs from a hundred thousand in a town, and mankind must develop different rules to meet the two cases. In cities there must be stricter supervision by the public, and as population increases the tendency will become more marked. This came about in England with the Industrial Revolution, which brought people together in factories, and hence in towns. In the United States it is only the last census which shows more people living in towns than in the country. Before studying the probable future development of this tendency it would be well to see how far the different departments of law are already affected; and it may not be improper to say even now that the underlying basis would seem to be the increasing feeling of Fraternity,—not the old and exclusive fraternity of the Gens, but a newer and broader Brotherhood of Man, beginning with our neighbor but transforming the meaning of the very word Neighbor.

In the domain of Persons, the tendency has been away from slavery and subjection in all forms. It has brought the equality of Woman, and brought with it also perplexing problems, for while the sexes are equal they are not and

cannot be identical. It is endeavoring to solve the problems of class and to protect the laborer against the capitalist, perhaps in provisional ways which are not always wise; and a reaction is now seeking to protect the capitalist against the laborer, perhaps also not always with wisdom. The ideal must be to preserve the individuality of every man, to give all equal rights before the law, in every feasible way to call out whatever is best in the individual. The old remedy for those who were disabled by age, infirmity or poverty was the poor house, which often tended to pauperization of the mind while only imperfectly aiding the body. The proper aim of modern civilization is to clear away obstacles, to give a man a fair chance, what a practical politician has called a "square deal." This, however, is rather the point of view, the ideal of the new times, than the law in its present condition. That some adopt the dreams of Karl Marx in his Kapital is unfortunate, for the individual spirit can be pauperized by state control just as much as by state aid; but every tendency must go through different moments, have actions and reactions, before it reaches a final solution.

So as to the Family. The court of chancery had long been trying to secure a separate estate to married women and this has now become a part of statute law. Marriage has been little changed in its personal relations except that it is now regarded as one of equality between the sexes, a partnership of minds instead of being merely, as under the Romans, a partnership of property. And Divorce is considered as a public concern, to be granted for many causes which the Canon Law did not recognize at all. It seems to be the interest of the public that an incompatible union should be dissolved, although there are all varieties of belief as to what constitutes incompatibility. The church has been a conservative force in these matters and divorce by the courts of the country has only slowly won its way. Nevertheless in the States it has becomer far too easy and divorce one of the scandals of American social conditions. The old paternal ownership in its English form has prac-

tically disappeared. Not only is a child of twenty-one practically independent, but at an earlier age his disabilities can be removed for his benefit, and even a wife can be made a free dealer under similar circumstances.

As to Successions, there is less to say. The state always claimed under the Common Law to be the heir of a decedent leaving no known kindred. It was not so much this principle as the growth of taxation which has brought about the Death Dues, Inheritance Tax, now so prevalent in all states, whatever may be the name used.

Under the head of Property we find the public interests pushed to their greatest extent. The Police Power, which, for instance, was practically unknown in the early decisions of the United States Supreme Court,—Chief Justice Marshall hardly knew the word,—has become the head of the corner. Under this title the state as representing the public is taking control not only of whatever affects the health, morals and safety of the public, but is adding the additional head of "public convenience," which is capable of indefinite expansion. Not only is the height of buildings regulated, but their material and everything else affecting their safety. Nowhere does the effect of city life show itself more clearly in the law. Nevertheless it is perhaps in the twilight zone between individual and public enterprise that the new view of law is most expressing itself. According to socialists the state must take charge of all industry. This doctrine is prevalent in Europe, but repudiated in America. It is quite true that everything which the individual cannot do is falling within the domain of the state, but at least in America the essence of individual initiative is preserved and deemed the foundation of civilization. Improving a public water course, digging out a harbor and spreading the earth upon the shore to make it usable, such public things must be done by the state if they are to be done at all; but that the instruments of labor, machinery and the like, must be owned by the state, or that they must be owned by the labor which did not create them, is a doctrine which has scant following in the United States. The liberty of the individual is still essential and organi-

zations which seek to build up a class of any kind are illegal. All men are not only born free and equal, but they must be kept free and equal. It is true that the Police Power has recently been extended to persons and property alike in prohibition laws. This seems to be permanent, although its form may be modified; but even this is on the theory that the individual is made a better and a more useful man.

The social tendency affects Contract in a marked degree, for it is here that individualism had gone furthest and most needed control. In 1879 Henry George had shown in his great book Progress and Poverty that the rich were getting richer and the poor were getting poorer. Like all theorists from Plato down, he had a simple remedy for a complex social condition, and advocated in effect the nationalization of land. This has not been much favored in America, but there have been a series of laws and decisions looking towards remedying conditions of society, particularly as regards the relation of labor and capital,—the two great factors in the production of national wealth,—and the control of both by the public.

Perhaps the first thing needed was in regard to the growth of industrial organizations, generally the combination of competing concerns, nominally to reduce overhead expenses but frequently to effect a practical monopoly by eliminating competition and thus controlling the market. At Common Law monopoly was forbidden, but there was hardly a legal requirement of competition. Competition, however, is the basis of modern legislation. Wisconsin probably led the way, but the foundation of present day law is the Sherman Anti-Trust Act passed by Congress in 1890, as interpreted by numerous decisions of the Federal Courts. The requirement of competition, however, could be pushed so far that the Supreme Court in declaring the Rule of Reason in the Standard Oil case in effect adopted Mr. Roosevelt's distinction between good and bad trusts. This leaves a good deal to discretion, for the line is not always clear. Reorganization has been forced of numerous concerns, not always effectual; but at least regulation in

the public interest has become a part of the present legal policy of America.

This is a different matter from a second line of development which has hardly more than begun,—the relation of the corporation and the labor organization. This is of public importance, as their frequent disputes injure production, whether of coal, iron, transportation or other things, in which the public is often vitally interested. In England the decision in the Taff Vale case, that labor unions were liable for the damages they caused brought a change in legislative policy upon the fall of the Conservatives in 1905, and laws were passed for the benefit of labor interests,—Employer's Liability, accompanied by the abolition of the Fellow Servant rule, Contributory Negligence and the like. There has been the same tendency in the United States, culminating in the Clayton Act of 1914, which forbade the issue of injunctions in disputes between capital and labor, and created a Commission to regulate the whole industrial relation. There has lately been something of a reaction, more judicial than legislative, in favor of the public and not of capital. It has been found lawful, for instance, to enjoin unlawful acts of labor where the public is concerned, and the Supreme Court has followed the principle of the Taff Vale case and held labor unions liable for damages they cause. The underlying idea is that labor should not constitute a favored class, having different laws from other people, but liable for unlawful acts like any one else.

This has brought to the public mind the fact that the public itself is the party of supreme importance in all matters where its interests are affected at all. This is bringing a strengthening of the powers of the State, for the State is the institution which political growth has evolved for the protection of all matters in which the public must act at all. The result, however, is of a different character from that which evolved the absolute State at Constantinople. There is in the Democratic evolution no question that it is the people as a whole who are interested, not any person or any class. And there can be no doubt

that this is the cornerstone of all legal development, at least in the Anglo-American world; and that stock is the controlling factor in human development at present, and probably will remain such.

In this connection should be noted that the tendency is distinctly towards prevention of litigation instead of the old way of ascertaining damages after injury has occurred. This brings a great change in legal views and procedure, but it is a legitimate development, which will increase and not diminish. This appears, for instance, in connection with Industrial injuries, a form of Torts. The Workman's Relief legislation has been a great step in this direction, by affording a kind of insurance against injuries, and thus aiding both employeer and employee. Nevertheless it is not done, as in Germany, by any form of State Socialism, but is an application of State regulation as distinguished from State control. A form of it is mutual, as where public school teachers are compelled to contribute to a fund to aid those who are sick. Generally the employers pay a fixed premium to the State treasury and the fund is used as an insurance of workmen who are injured, beyond which they can claim nothing of any one. It preserves the individuality of both employer and and employee and does not leave the business in which the public may be interested to the hazard of accidents, which may ruin all alike.

Necessarily this calls for supervision by the public, and settlement by special commission; for the old courts are based upon the principle of a dispute between equals, a fair fight and no favor, while these matters of public adjustment require special forms of action, still leaving the old remedies for the old kinds of suits.

Such tribunals have a procedure all their own. Their members are not ordinarily men learned in the law and the result is somewhat what was seen under the Roman praetor when he referred a case to an ordinary citizen as **judex**. The proceedings are practically not controlled by the rules of pleading and evidence which have grown up at Common Law, and matters of procedure, direct, hearsay, and other kinds of proof are largely within the control of the Board,

which is organized to get at results as quickly as possible. This has not directly affected judicial tribunals, but even there we find the tendency towards the substitution of petitions and simple forms of procedure. How far such tribunals should be supplemented by court control is a separate question.

Upon the whole, therefore, we seem to be living in an age when more and more emphasis is laid upon the State as the organ of law, and the individual must modify his activity for the public good. The Supreme Court of the United States has gone far in the cases affecting social questions, particularly since the accession of Chief Justice White. This is true in such matters as the epoch-making case over the Adamson Law, where he decided that the United States is not only a government, but as such has underlying powers, which can hardly be called express or implied, to be used for the benefit of the country as a whole. The United States, therefore, while not having a Common Law, as held by Mr. Justice Chase in 1798, has Police Power greater than the states insofar as the Union is greater than the states. But it is private law with which we are specially concerned, and here a line of decisions, from the South Carolina liquor cases, through child labor to the North Dakota corporation cases, make clear that state control is still in its infancy.

Nevertheless it is the state as representing the individual citizen and not the state as directing individuals or classes. Throughout English and American history the community as a whole has been like the solar system, consisting of a central and of subordinate units. At different times emphasis is laid upon the one element or upon the other, according to conditions that prevail; but both the sun and the planets are necessary, both the state and the citizens make up the social system. In Europe the emphasis has been laid upon the State, in America the emphasis has been laid upon the Citizen. Both must coexist, but our studies have shown that the State exists for the benefit of the Citizen. If his activities may be regulated for the benefit of the public, if his spirit of Fraternity is to be

cultivated, nevertheless this regulation and cultivation are for the benefit of a public made up of other individuals.

The greatest good of the greatest number is attained by retaining unimpaired in all essentials the Liberty and Equality of the individual.

The Individual must remain the unit. His relations, proceeding from his Personality and his Property, are those which build up the social structure. The relations of Persons may not greatly change in future, but those connected with Property will. Some species of property, like mines, railroads and other things may come more under public control. New kinds of property may arise, indeed, have arisen as with patents, copyrights and trademarks. Before our eyes fishing, oyster planting and other things are being changed from public to private ownership, or vice versa. But this is only a shifting of boundaries. Private law must always be distinguished from public law. Family, Property and Succession may continue to be the strongholds of Status; Obligations,—or the forms of contact of man and man in Contract or Tort,—may assume new shapes to meet new circumstances; but in the last analysis they are all merely expressions of Personality. Criminal and political law have a reason for their existence only as they aid in the development of the Individual; the Church and the State are only means,—great means as they are,—to this end. Socialism is ill named so far as it aims at destroying the unit which makes up society. Individualism gives an impression almost as misleading so far as it omits that which unites the individuals into the body politic without which they cannot exist. Man lives only in society, in union with his fellows; and law is the social discipline by which he attains his truest individuality.

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